THE SIMPLIFICATION OF THE MACHINERY OF JUSTICE WITH A VIEW TO ITS GREATER EFFICIENCY

REPORT TO THE PHI DELTA PHI CLUB OF NEW YORK CITY BY ITS COMMITTEE OF NINE[1]

HENRY W. JESSUP, J.D., Chairman.

In the thirty-fourth of the fifty resolutions written by David Hoffman of the Baltimore Bar, he observed:

> Law is a deep science. Its boundaries like space seem to recede as we advance and though there be as much of certainty in it as in any other science, it is fit we should be modest in our opinions and ever willing to be further instructed. Its acquisition is more than the labor of a life, and after all can be with none the subject of an unshaken confidence.[2]

Burke said in reference to the administration of justice that it was the "highest concern of man on earth."

The American Bar Association in the preamble to its Canons of Ethics has declared:

> In America where the stability of courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public should have absolute confidence in the integrity and impartiality of its administration. . . . . The future of a republic to a great extent depends upon our maintenance of justice pure and unsullied. . . . .

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[1] This committee was appointed at a meeting of the club held on October 23, 1916, for the purpose of considering what changes in the Constitution, statutes and rules operative in the state of New York are essential to the simplification of practice and greater efficiency in the administration of justice. It followed the activities of a former committee known as the Committee of Seven whose report was the first of those issued by any group of lawyers at the time of the debates on judicial reform preceding the New York Constitutional Convention of 1915, and was submitted to and considered by the Judiciary Committee of that Convention. The members of this committee are as follows: Henry W. Jessup, Chairman, Dean Emery, President, *ex officio*, Harry N. French, Edwin S. Lewis, R. A. Mansfield Hobbs, Willard A. Mitchell, Lawrence S. Coit, Hugh R. Partridge, George W. Alger, Leigh K. Lydecker; and Hon. Norman J. Marsh, advising with the committee. Any person desiring to communicate in regard to the subject matter of the report or in regard to ordering reprints thereof may communicate with the chairman at 55 Liberty Street, New York City. Reprints can also be secured by applying to the American Academy of Political and Social Science, Woodland, Ave. and 36th St., Philadelphia.

[2] David Hoffman, *Course of Legal Study*, 2d ed. 1836, Vol. II, p. 751 *et seq.*

PART ONE—A JUDICIARY ARTICLE FOR THE STATE CONSTITUTION

I THE NEED FOR IDEALISM

The initiation, or promotion, or effectuation of any reform in methods of administering justice is ever the task of those who are able to visualize that which is not yet realized—that is, of men with ideals. And the "practical men" are often impatient of the idealist. And yet, as M. Woolsey Stryker has said, "Idealism is the most practical thing in the world, because tomorrow is at the doors, and we must meet it!" In the words of Charles A. Towne, "There never was any progress without ideals. . . . . Ideals . . . . . are the basis of all ethics . . . . . the foundation of all justice. Ideals of right are the fundamental condition of human liberty."

An ancient seer and reformer, the prophet Joel, recognized the dynamic power of ideals, as a means to an end when he said:

> "Your old men shall dream dreams;
> Your young men shall see visions."

II SOME FUNDAMENTALS

Your committee recognized at the outset the magnitude and importance of the task entrusted to it, but entered upon it with the more enthusiasm and sympathetic interest because we realized that similar questions were receiving the earnest and patient study of other associations of lawyers throughout the United States, notably in Illinois, California, Mississippi and Massachusetts. Also the American Judicature Society, organized in July, 1913, had been engaged upon the subject since the time shortly subsequent to the launching of this question of greater legal efficiency in the discussion before the Phi Delta Phi Club of New York, February 17, 1913. This had resulted in a paper on that topic printed in *Bench and Bar*,[3] in March of that year.

In order to comprehend more exactly the subjects of this report, which is presented for discussion and criticism by the American bar and by such of the general public as are interested, it is proper to premise certain fundamental propositions to which, by its action heretofore taken, the Phi Delta Phi Club has committed itself. It seems almost too good to be true that the recall-of-judges heresy

[3] Published in New York City.

has almost passed into the category of forgotten movements. At a luncheon given at the Lawyers' Club of New York to the Chief Justice of Korea early in 1913, the late William B. Hornblower in an address of welcome expressed the hope that the recall-of-judges heresy had not yet invaded the jurisdiction of that Oriental jurist. The Chief Justice, through an interpreter, responded that he had observed that the main objectives of Confucius and of the Founder of the Christian religion were similar, in that both contemplated an ideal state of society in which there should be peace, that is, an absence of disputes between man and man. "And therefore," he wittily concluded, "If you are as consistent in your religion as we are in ours, you are working for and towards a state or condition of society known as peace, in which disputes shall be at an end, *and then there will be an automatic recall of judges and lawyers alike.*" We are concerned with the fundamental fact that "the system for establishing and dispensing justice" is, in the United States of America, by no means uniform. It is articulated into complexly differentiated tribunals and the laws that govern the relations of the citizens of the United States to one another are such that status and the enforcement of rights may differ through the mere fact of residence on one side or the other of an imaginary line that marks a state boundary. And in the particular state to which our attention is called, and with whose Constitution and codes and rules of court we have been for a long time occupied, there has been a condition which can hardly be styled as efficient or expeditious, although by the self-sacrificing efforts of the judiciary of the state and the determination to end what is called "the law's delays," great reforms have already been accomplished when the situation in 1917 is contrasted with the situation, say in 1907. Nevertheless, there still exist anomalies, duplications of effort, unnecessary cogs in the judicial machine creating friction, arresting the prompt and expeditious functioning of the machine, and justifying in the opinion of fair-minded lawyers some of the criticism which the general public is so quick to hurl at lawyers and judges and the so-called "system of justice."

Certain cardinal formulae of efficiency have been promulgated by this organization in the report of its Committee of Seven, to which formulae reference will be made below. The dominant idea was the application to the system of courts of justice of the

"efficiency" principles that have been developed for the guidance of other American business.

III The Need for Efficiency

Treating the system of administering justice as if it were a great machine, it is obvious that if the courts are to be regulated by the same theories of efficiency as any other administrative business or organization, what we desire must be the frictionless movement of a well-lubricated machine in which all the parts coöperate to produce the desired result. "Peace" in its last analysis is frictionless activity, not inaction or idleness, and frictionless activity is an ideal condition of human life; and either term, strange and anomalous as it may seem, is the ultimate desired condition of the administration of justice, in spite of the fact that the administration of justice relates itself to the settlement of contentious disputes.

The literature of efficiency in recent years asserts the claim that "efficiency," which in respect to any particular machine or form of activity is the product of the greatest desired result with the least friction and delay, is like a science capable of being applied to any given form of human activity and is based on certain fundamental or cardinal principles. In the paper on "Legal Efficiency" above referred to the following summary statement was made:

> A number of pamphlets, books, treatises, reports of conferences, have appeared in recent years on the subject of scientific management, or *efficiency*. And it is claimed with great cogency that efficiency is really a science capable of being applied to any given form of human activity and based on certain fundamental or cardinal principles. Mr. Frederick Winslow Taylor emphasizes four, to wit: scientific method; scientific selection of machines; scientific specialization and its development by instruction; scientific coöperation and redistribution of responsibilities. Mr. Harrington Emerson names twelve, to wit: clearly defined ideals; common sense; competent counsel; discipline; fair deal; reliable, immediate, adequate records; dispatch; standards and schedules; standardized conditions; standardized operations; written standard practice instructions; efficiency reward.
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> With these principles in mind, if we assume that legal efficiency for the purposes of this discussion is ideally possible this side of the Millennial Recall, it can only mean that there shall be the frictionless functioning of all the parts of the great machine of justice wherein the legislature, the courts and the bar shall coöperate in speedy and righteous administration of the law. Such efficiency is a moral duty.

IS THERE CRITICISM?

So long as legislatures grind out laws which are set aside as unconstitutional, or which speedily become dead letters; so long as there spreads through the country a spirit of dissatisfaction with the administration of justice, which has become embodied in this agitation for the recall of judges; so long as the community indulges freely in criticism of the methods and practices of attorneys as dishonest, tricky or dilatory; just so long may we assume that we have not reached the ideally possible stage of legal efficiency, and are warranted in examining the conditions, attempting to formulate some principles the application of which practically might result in an approximation of our ideal. If we superimpose Mr. Taylor's four fundamentals on the twelve principles formulated by Mr. Emerson, and take, as it were, a composite photograph of both, we might find three principles standing out in this composite relief:

(a) Definite ideals standardized into a system in the light of experience and common sense.
(b) Scientific selection of materials and workmen.
(c) The system moving with dispatch and without friction because of coöperation and *redistribution of the strain.*

IV SOME OBSTACLES TO BE MET

It has become a commonplace that litigation connotes delay. The law's delay is popularly supposed to be a *sine qua non* of litigation, and lawyer and judge are, at the bar of public opinion, alike held guilty as the *causa causans* of the condition. So firm and widespread is this conviction that many popular alternatives for the settlement of disputes by courts of justice have been put forward, and some are fully established in operation.

The bar and the legislature, by committees and commissions, have grappled with the problems inherent in the situation, but they have moved slowly—with little unanimity. They have yielded to considerations of political expediency—they have persisted in treating judges as the incumbents of an office carrying emolument, and they resort to medicine to cure or tone up, rather than to surgery to remedy the juridical body.

Your committee has felt, therefore, the need of appealing to the general public. It has dreamed—it sees a vision—it has sought to visualize a new efficiency in the administration of justice, and it offers its ideals for examination, not ignorant of the usual fate of all idealists, but convinced that "tomorrow is at the door," and that the ultimate desired reform must come from the people, guided by the learning and experience, even though restrained by the prejudice and conservatism of the American bar.

V RESPONSIBILITY OF MEMBERS OF THE BAR

Coincidently with this agitation with regard to the law's delays, the clamor for the recall of judges, the contention that courts were exceeding their intended powers when they assumed to set aside as unconstitutional the will of the people expressed in the statutes of its legislatures, the bar of the United States and those of most of the individual states have been successfully active in formulating, promulgating and adopting codes of professional conduct or so-called "canons of ethics," which, little by little, *e.g.*, by amendment of the existing rules for the admission of attorneys, have been made in principle and spirit, binding upon those applying to be admitted to the bar. In the 1917 report of the writer, as chairman of the Committee on Professional Ethics to the American Bar Association, is noted the outstanding fact that the legislature of the state of Washington, by chapter 115, L. 1917, §20, enacted that the canons of that Association "shall be deemed the standard of ethics for the guidance of the members of the bar" of that state. The bench and the bar alike, through committees on professional ethics, committees on discipline or grievances, or committees on the unlawful practice of the law, in various jurisdictions have been seeking to write into the decisions of the various states the general principle that these canons supply a norm of conduct to which decent members of the bar must conform.

This movement has gained such headway and is in such general operation that, as Mr. Elihu Root remarked to the framer of this report, "Sufficient rules of conduct have now been formulated and adopted, and we have reached the period for the application of those rules in professional conduct generally."

Consequently, this committee is of the fundamental opinion, and bases its entire report and such recommendations as it may set forth herein, on the principle, that it is the duty of an educated and conscientious bar to give to the matter of the development of the system of administering justice thoughtful, painstaking and self-denying study and attention, in full realization of the fact that such development must be sympathetic, and must be based upon an intelligent apprehension of what our heritage from the past is and what it means. As an alternative, we must be satisfied to have our system of jurisprudence seized upon and dissected in the laboratory of the doctrinaire, or the "social reformer," often unsympathetic

with the value and influence of precedent, who is willing to sacrifice a system to speed, and the general effectiveness and sureness of a rule of law to the Solomon-like end of doing the right thing between two particular individuals.

Even the President of the United States in addressing the American Bar Association in Washington, in 1914, summed up the popular belief that justice administered in a court is not identical with that which "the innate sense of justice in every human breast conceives to be applicable to a particular dispute."

This paradox has been recognized from the beginning of the development of our law. Doctor John Norton Pomeroy in examining the origin of equity jurisprudence and showing the arbitrariness and formalism of the original five actions that constituted enforcement of civil rights in the earliest period of Roman law, quotes from the Institutes:

"All these actions of the law fell gradually into great discredit, because the over-subtlety of the ancient jurists made the slightest error fatal."

Going on later to emphasize the importance of a correct notion of equity, which he says is not a theoretical but a very practical inquiry, he observes:

"If a certain theory of its nature which now prevails to some extent should become universal, it would destroy all sense of certainty and security which the citizen has, and should have, in respect to the existence and maintenance of his juridical rights."

These observations, we may note, were made in 1881. And this conception to which he refers was known, he says, to the Roman jurists, and was described by the phrase *arbitrium boni viri*, which he translates, "the decision upon the facts and circumstances of a case which would be made by a man of intelligence and high moral principle." He closes by observing:

"It needs no argument to show that if this notion should become universally accepted as the true definition of equity, every decision would be a virtual arbitration, and *all certainty in legal rules and security of legal rights would be lost.*"

Popular opinion, however, remains unconvinced. It wants each individual dispute settled right—and if precedents or rules of evidence intervene, it clamors that they be disregarded or overruled.

This is not a fanciful danger. While we do not for a moment

contend that the social development of the last fifteen or twenty years in the way of tribunals *ad rem* where rules of law are thrown to the winds and where disputes are expeditiously adjusted, is a dangerous development, we do contend, for the purposes of this report, that it is a symptomatic development, that it indicates a trend in public opinion that must be reckoned with in the matter of any permanent and profitable reform in procedure and in the organization of our courts; and it will be seen as this report progresses that we have reckoned with this trend and yet have contemplated that some of the suggestions which are put forward are those which may at the outset commend themselves more immediately to the judgment of the people at large than to that of our brethren of the bar. It was because of our consciousness of these divergences of conviction that we quoted from the Hoffman resolution, and we reprofess our diffidence in promulgating the evolutionary (but, we earnestly urge, not revolutionary) suggestions for the elimination of cogs and for speeding up the juridical machine.

VI Recommendations of the American Judicature Society

The labors of the Constitutional Convention in New York in 1915 came to naught. They were repudiated at the fall elections. The judiciary article fell with the rest, not being separately submitted. But that article fell within the category above noted of "medical" rather than "surgical" remedy. It failed of realizing the philosophical or ideal standard.

It still reckoned with politics and offices, and persons likely to be affected. Little groups here and there were in favor of separate provisions in it, but as a whole it was a mixture and not homogeneously consistent and it commanded no general or enthusiastic support. Great as might have been its value as a step of progress, still it would seem, in the retrospect, as if it would have been merely a side step, a "bypath meadow," a temporarily easier road, but one ultimately to be abandoned, while the great step forward must ultimately be made at the very point of divagation by more drastic, logical and fundamental reorganization. It failed to take into account the full meaning and value of two great movements, to one of which brief allusion has been already made.

There had been growing into an increasing influence a group known as The American Judicature Society, interested in having a

common sense, simple, directly functioning and efficient system of court organization. And alongside this were the activities of the Committee on Uniform State Laws of the American Bar Association, one of the most potent influences for breaking down the complications introduced into the relations of American citizens by the peculiar survival of the theory of the foreignness of each particular state to all of the other states, so that citizens of one state doing business with citizens of another state might in the event of ensuing litigation be confronted with the necessity of conforming to different laws administered under an entirely different procedure.

As to the uniform state laws, the principle of such uniformity, that is as to its desirability in regard to matters in respect of which there never was any substantial defensible reason for diversity, has been recognized and approved by every state of the Union.

In the report of the Committee on Uniform State Laws made to the American Bar Association in 1916, it was said that "the adoption by the various states of uniform state laws which the conference of commissioners has proposed from time to time, has been continuous and increasingly enthusiastic." The committee reports that the Negotiable Instruments Act has been adopted in forty-seven states, the Uniform Warehouse Receipts Act in thirty states, and the Uniform Sales Act in fourteen states. In addition that committee prepared and submitted for adoption uniform acts on divorce, stock transfer, family desertion, probate of foreign wills, marriage evasion, partnership, workmen's compensation and cold storage, and offered with its report of 1916 a uniform land registration act.[4]

The American Judicature Society at the same time had been seeking to frame a model act for the organization of courts, a model practice act and model court rules for the governing of practice, with the laudable idea of making uniform the administration of justice throughout the Union.

The state of New York had, for several reasons, been by way of dominating the practice of other states, perhaps because of the fact that its practice acts were more highly articulated at the time when so many states were considering whether or not to adopt codes. Material was thus afforded for the draftsmen of

[4] See Minutes, American Bar Association, 1916, p. 428 *et seq.*

other states to use in formulating their own codes, merely making differentiations to cover their own peculiar necessities, or assumed requirements. And so, at the time this committee was appointed, and after the failure of the Constitution to be adopted by the people at the election of 1915, the administration of justice in the state of New York was still dominated, controlled and regulated in about as elaborate a manner as it is possible to conceive. It had a Judiciary Article in its Constitution by no means comprehensive because it could not be deemed in and of itself to be all that related to the administration of justice set forth in the Constitution, but, on the other hand, not sufficiently generic, it contained details that ought never to be in a Constitution and restrictions and regulations that, in view of the natural rate of development and evolution in such a community as that of the Empire State, rendered the constitutional regulations inelastic and too rigid in points of detail that ought not to have been included, and subject, in respect to any amendment or change therein, to so much delay and so much machinery and so much missionary expenditure of time and effort to secure any particular change, that it had become a document not adapted to the judicial conditions in popular opinion and in the life of the community.

In the next place, it had a Code of Civil Procedure of no less than 3,384 sections. Many of these were not procedural but substantive; many were hybrid in these two respects, and many more were the subject of numerous amendments by the legislature from time to time. Some of these amendments were the result of painstaking and conscientious effort to improve some particular chapter or title of this code and make it more adaptable to present needs; others were of purely local or private nature, put through the legislature for the purpose of affecting some particular controversy in advance of the day of trial. Some were for the obvious purpose of merely meeting and obviating the effect of some judicial decision based upon the infelicity of particular phraseology. In addition to this, there were rules of practice. There were general rules; then rules made by the Court of Appeals; others by the appellate division of each judicial department; others for the governing of trial terms; others for the governing of special terms, that is, the parts for the trial of causes by a court without a jury, or for the disposition of litigated and unlitigated motions; others

were made by the City Court and others by the Surrogates' Courts. Special rules existed for the county courts and special rules for the municipal courts; with the result that it was not infrequently the case that a member of the bar of New York, admitted to practice in all its courts, would upon being confronted with a case in a court of special or limited jurisdiction, be under the necessity of retaining as counsel, to guide him, one whose practice was more or less exclusively within that court.

The substantive law of the state, starting with the interesting fact that it was the common law except as modified by statute, had developed into a series of volumes of what were called "Consolidated Laws," nearly a dozen in number, and of over 10,000 pages, including amendments and supplements, and two volumes of unconsolidated laws, being a statutory list or record of special, private or local statutes of the state from 1778 to 1911 of about 3,200 pages; mere tabulations of these laws by chapter and year, with a brief statement of the subject and disposition thereof. That this was an intolerable condition everyone had come to realize and a Board of Statutory Consolidation had been created by chapter 713 of the laws of 1913, charged with the duty of simplifying the civil practice in the courts of the state. This board, making a report to the legislature in 1915, summarized the situation as follows:

> When the state constitution was adopted, the people of the state accepted as a part of the law of the new commonwealth the common law procedure of England as the same had been modified by the legislature of the colony of New York, subject to such alterations and additions as the legislature of the new state might from time to time enact with reference thereto.[5]
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> The dissatisfaction with the condition of the procedure in the courts as well as with the general substantive law was voiced in the provision of the constitution of 1846 which directed the legislature to appoint commissioners to reduce into a written and systematic code so much of the whole body of the law of the state as seemed practicable and expedient to them.[6]
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> Pursuant to this provision of the constitution the Code of Procedure was adopted in 1848 which made substantial changes in the common law practice and regulated the bulk of the procedure by statutory rules.
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> The Field code, by which name the Code of Procedure of 1848 was commonly called, sought to regulate only the general features of the practice by statute leaving the courts to control the details by means of rules.
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> This system together with other statutes bearing upon the subject continued

[5] Constitution 1777, Art. 35.

[6] Constitution 1846, Art. 1, § 17.

to govern the procedure in the courts until the adoption of the first part of the Code of Civil Procedure in 1877 which with the supplemental chapters added in 1880 has regulated the practice in this state down to the present time.

The Throop code, by which name the Code of Civil Procedure has been known, was based upon the idea of bringing together within the covers of a single book all matters relating to procedure whether substantive or otherwise and regulating all of the details of practice by statutory enactments.

The criticisms that were made against the Code of Civil Procedure at the time of its adoption have been fully justified by experience; and ever since its enactment, speeches, addresses and reports have been hurled against it.

The agitation on the subject resulted in the passage of an act in 1895 providing for the appointment of commissioners to report "in what respects the civil procedure in the courts of this state can be revised, condensed and simplified."[7]

The final report in pursuance of this statute was submitted to the legislature five years later but opposition arose to the plan followed by the commissioners and the report failed of adoption.

In 1899 a report of the Committee on Law Reform of the State Bar Association was made, in which the committee recommended "a simple practice act containing the more important provisions of the present code rearranged and revised, supplemented by rules of court."

A joint committee of the legislature in 1900 recommended a general plan, one of the features of which was "to reduce the general practice provisions to a single brief legislative practice act."

In 1903 a committee called the Committee of Fifteen made a report to the legislature pursuant to chapter 594 of the laws of 1902 in which it made various recommendations which would give as the report states: "A statute covering practice only, supplemented by such rules as may be deemed necessary to carry out fully its provisions."

In 1903 the Committee on the Law's Delay made its report with reference to the condition of procedure in the first department and made certain recommendations which however were not adopted.[8]

BOARD OF STATUTORY CONSOLIDATION

At this time the Board of Statutory Consolidation was created by chapter 664 of the laws of 1904 by which it was authorized not only to consolidate the general statutes of the state but to revise the practice in the courts.

The board found the task of simplifying the practice too great a one in conjunction with the work of consolidating the statutes and therefore directed its attention to the latter.

In 1909 the board presented a consolidation of the general substantive statutes of the state which were adopted that year and later it prepared a statutory record of these statutes and also a statutory record of the special, private and local statutes.

The simplification of the practice, however, had not been overlooked by the

[7] L. 1895, ch. 1036.

[8] L. 1902, ch. 485, amended by L. 1903, ch. 634.

board and in 1906 there was prepared a reclassification of the provisions of the Code of Civil Procedure under a logical analysis following the steps in the progress of an action.

In 1912 by chapter 393 the legislature directed the board to examine and report a plan for the classification, consolidation and simplification of the civil practice in the courts of this state and in the following year this report was presented to the legislature.

In 1913 the board was directed to prepare and present to the legislature "a practice act, rules of court and short forms" as recommended by the board in its report to the legislature of 1913.[9]

In accordance with that statute we report to the legislature of 1915 statutes and rules designed to carry out the directions of the legislature and to simplify the practice in the courts of the state.

VII GENERAL PRINCIPLES OF REFORM

This report on simplification had been submitted to and discussed by the bar associations of the state of New York through able committees. It has been before the public at public hearings of the Joint Legislative Committee having this report under advisement for the legislature of the state. And it has been carefully examined by this committee with the primary result that a conviction has been formed in their minds that in the nature of things there are two theories of reform. One may be called the patchwork theory, and has high authority in support of it. It consists of emendations, "here a little, there a little, line upon line, line upon line, precept upon precept, precept upon precept," with the result that the modification or change that is sought is distributed over a period of time. The fact that drastic changes will result is concealed from a suspicious public, apprehensive that in some way their liberties or pockets will be unfavorably affected by any reform advocated by lawyers alone.

The other theory of reform is that urged by those who are conscious of the historic value of all developing institutions, but nevertheless have the courage, for it involves courage, to attack this particular problem of reform on the same theory on which the founders of this republic attacked the task of drafting a Constitution and of organizing the courts of the United States and, from time to time, of the several states of the Union. This method, postulates the ideal as its goal, the ideal in a constitutional Judiciary Article and the ideal in the distribution of powers of subsequent

[9] L. 1913, ch. 713.

regulation between the courts and the legislature. Confronted with both ridicule and abuse those who pursue this method must focus their attention undividedly upon the logical consistency of any plan which they put forward. To any limited group, such as this committee frankly concedes itself to be, both in its access to the general mind of the community and by reason of its own predispositions or prejudices, that which may seem logically consistent may nevertheless, when scrutinized by those of wider experience and learning, reveal defects not obvious to the framers. It is for the particular purpose of having such defects revealed that this report is given publicity and presented as an attempt to frame and formulate a concise and generic scheme of legal and judicial efficiency, adaptable to the evolution of the community and its needs and yet sufficiently rigid to preserve from impairment those things which are vital and necessary to the durability of the judicial system.

It will not surprise students of jurisprudence that certain questions emerge in this report which, so far as the state of New York is concerned, may be supposed to have been settled beyond the hope of change. Such, for example, is the reëmergence of the question of an appointive judiciary, with the interesting but vital modification that the appointing power should be, not in a legislature, nor in a governor, but in a chief justice of the state, who himself should be elected by the people, so that the three departments of the people's power, legislative, executive and judicial, should *all have their roots in the popular will, should all be accountable to the people;* but each should be so organized and in particular the judicial power, as to be independent of legislative and executive control, except in certain well-defined respects adequately indicated in the discussion below.

Another feature which emerges in this report, and which it is hoped will lead to immediate intelligent discussion, is that of a general court of plenary jurisdiction, having all the powers and attributes of all the existing courts in the state of New York, but divisible, by its own act, into as many parts or divisions as the exigencies of judicial business may from time to time require, such as an appellate division of last resort, intermediate appellate divisions, probate divisions, divorce divisions, commercial law divisions, tort divisions, criminal parts or divisions, and those in

turn divided into parts dealing with felonies, others dealing with misdemeanors and minor offenses, but all presided over by a judiciary, any member of which has the full plenary power of the court to determine and dispose of causes coming within the jurisdiction of the part over which he is presiding, so that no longer can one enter a court of justice asserting a right or complaining of a wrong and find himself, perhaps after months or years of delay, ejected and informed that he should have applied to some other division of the judicial system of the state and have pursued his remedy in another forum.

Opposition will surely develop to any suggested reform that is comprehensive and drastic, that involves a reforming of the old judicial machine, an elimination of long-familiar cogs that distributed power and wasted it, so that there may be direct transmission of power and as little intervening machinery as possible. Such reforms always arouse opposition. The abolition of a code cannot but lead many lawyers to suppose that, if there is to be repealed all that they know, they will have at an advanced age to learn practice *de novo*, and that their earning capacity will be diminished. In spite of the education and intelligence of the bar as a body, their objection to this particular reform is precisely similar in principle to that of the workmen in England to the introduction in mills and factories of labor-saving machinery, resulting in strikes and disorders, which only, however, in the end reacted upon those who were not able to see that certain things must come.

Also, as to the elimination of courts as separate institutions, having specific and limited powers, differentiating them from other courts, and at the same time preventing them from doing adequate and ample justice in cases which have by reason of special features warranted their assuming jurisdiction, these special courts have advocates and devotees who deprecate as a personal matter any consolidation of them in a court of general plenary jurisdiction. Moreover, the judges of higher courts with which these lesser courts would necessarily be homologated under such a reform cannot resist a feeling of opposition based upon the apparent equality which the judges of these inferior courts would at the outset have in respect of power and jurisdiction (we do not even suggest of salary), and are reluctant to share their dignity with those who were not primarily chosen with a view to their serving as justices of a court

of general jurisdiction. Thus the opposition to any such drastic reform comes from above and from below.

Again, any suggestion of reform must also take into account not only the activities of bar associations and groups of lawyers, students of jurisprudence and men determined to secure the ideal in the administration of the law, but also the opinion and conviction of the man in the street, or the average citizen from whose ranks come the litigants and jurors in the courts of justice of the land. Many members of the community are brought into touch with the administration of justice as jurors, witnesses, litigants, spectators, readers of the public press. Among them, if we may properly judge from current literature, there has grown up an impatience with the operation and application of certain principles of the law, substantive and adjective, including the law of evidence which is betwixt and between; so that it is not unusual to hear a man assert with an air of finality that the object of legal forms and procedural statutes and rules of evidence is to prevent rather than to effectuate justice. Some of these objections and misapprehensions on the part of witnesses, jurors and litigants are amusingly portrayed in a recent publication by a justice of the Municipal Court of New York City.[10]

There is a rule in force in most of the states that one shall not testify to transactions with or communications from or to one since deceased, upon the obvious theory that the person with whom the acts or communications were had cannot contradict them, and the result is that in many probate cases, especially in accountings, it is impossible to ascertain the facts, because of the operation of this rule known as Section 829 of the Code of Civil Procedure, in the state of New York. A case was recently tried where the attorneys were so occupied with the ebullitions of their respective clients attempting to interrupt and contradict one another that neither of them thought to interpose any objections under this section, with the result that the testimony of the witnesses duly sworn, and received by the referee with the determined purpose to ascertain the facts if possible, resulted in all the facts being fully testified to, and when *the facts were all testified to*, a settlement of the controversy resulted in about ten minutes, and the determination of the referee was made upon consent. Whereas, had it not been for the eliciting of this testimony,

[10] *The Man in Court* by Frederick DeWitt Wells, C. P. Putnam's Sons, 1917.

which could have been prevented by objection from either side, the facts out of which the settlement necessarily and expeditiously resulted would not have been known to the adversaries nor to the referee presiding. And so, to many a layman it would appear that a judge might very well be empowered to comment on testimony of this sort, to receive it with the distinct limitation that the question for the jury, if there was a jury, was one of the credibility of the witness testifying on the apparently safe assumption that he could not be contradicted, and permitting the judge to comment on the credibility of the testimony in his charge to the jury, just as he would comment in forming his personal judgment upon evidence if he himself had tried the case without a jury. For to swear a witness to "tell the truth, the whole truth and nothing but the truth," and then to prevent him from disclosing to the court the very thing, communication or saying that is determinative of the conduct which is the matter of scrutiny in the particular litigation, seems unfair and preposterous to the ordinary man.

So it is in regard to the rule against hearsay testimony. The man in the street forms his judgment in regard to his every-day affairs, his investments, the enlargement or contraction of his business, his judgment as to the relationship to him of partners, customers, competitors, and so on, on hearsay testimony, and yet when he is in a jury box and sworn to do justice between two adversaries, and to decide the case upon the facts thereof, he finds himself excluded from finding out how it was that one party or the other came to act as he did, although it is a matter of general human cognizance that men act upon what they hear just as much as upon what they observe or feel. So in respect to the rule of hearsay evidence, it is not unlikely that we might find the exceptions to that rule being emphasized, and the rule itself being limited by some such device as was suggested in the rule against testifying to transactions or communications with a decedent.

There is another feature connected with the dissatisfaction with the delay of the courts in disposing of matters committed to their arbitrament, and that is the erection of various bodies by the people having quasi-judicial powers and intended to accelerate determination of matters requiring speedy and authoritative determination, so that commissions of various sorts have been erected. These commissions determine rights and award and deny privileges,

all upon the same kind of testimony that affects the man in the street in making his own daily determinations. In the case of the workmen's compensation boards the people have chosen to enact that their findings of fact shall be conclusive when the propriety of their action is reviewed in the courts, and it is a well-known fact that these workmen's compensation boards, or commissions, brush aside all technicalities of the rules of evidence and try to get at the facts that they want to know. Assuming the validity of the plan of taking the money of an employer regardless of his negligence or the degree of care which he has exercised over those whom he employs, to pay one who, by his own careless or reckless conduct may have invited the disaster, it is nevertheless true that the public has welcomed and approved this rough-and-ready method of getting at the facts and ending a controversy in a minimum of time.

VIII The Significance of Public Opinion

We have therefore to take into consideration, not only the efforts made all over the land to simplify the procedure in the courts and to shorten the time within which a litigant may have his controversy adjudicated and disposed of, but also the efforts of the American Judicature Society to get the bar of the whole country interested in uniformity of court organization and of practice in the court. Not only have we the tendency to press the suggestion that codes be abolished as far as possible in favor of a very concise short practice act, and that the regulation of judicial business be left to the courts so that they may adapt themselves to changing conditions in the simplest and most natural way; but also we have the movement spreading all over the country, aligning the bar on platforms of high ethical standards which bind them not only in their relations to clients and to the courts in which they plead their clients' causes, but in all respects in which they discharge their duties as citizens in the communities in which they live and move and have their being.

There is also the movement just hinted at spreading over the various states of the Union to establish "quick-lunch" tribunals, or boards, or commissions, which do not need to be enumerated. The workmen's compensation commissions, already adverted to, are a sufficient illustration. They are based on a principle which in the higher sense is socialistic; they postulate a liability to pay on the

part of the employer, irrespective of the negligence or fault of his employes. They drive rough-shod over the rules of evidence for the purpose of ascertaining the facts, and in most cases the facts as found by these tribunals are deemed conclusive upon the courts of review.

But it may be well to call attention to one other example. A milestone in the history of such development in New York is marked by the promulgation of the system of "arbitration and conciliation," and the rules for carrying it out adopted in the municipal courts of the city of New York under Section 8 of the *New York Municipal Court Code*, published in the month of April, 1917, providing for an agreement to arbitrate before a justice of the court or any other person. This agreement, after the first hearing, is made binding on the parties. The arbitrator is required to proceed to hear the controversy, and we quote this significant phrase from Rule 3:

> He shall not be bound by the rules of evidence, but may receive such evidence as it may seem to him is equitable and proper. Either party may be represented by counsel, but no record of the proceeding before the arbitrator shall be kept, and no expense shall be incurred by him in the proceeding except upon the consent in writing of both parties.

This scheme of arbitration is promulgated contemporaneously with one for conciliation, by which a person may proffer a note of conciliation with regard to any claim which in his opinion may be adjusted without resort to an action at law. And in respect to these notes of conciliation and the hearings before the justice, which are informal, under Rule 4 the following phrases are significant:

> The justice hearing the case shall endeavor to effect an amicable and equitable adjustment between the parties . . . . *he shall not be bound by the rules of evidence, but may receive such evidence as seems to him equitable.*

These phrases embody what seem to your committee the most significant development in the public attitude toward the administration of justice, namely, that the public is growing impatient of the application of these time-honored rules for ascertaining facts in courts of justice. The man in the street reaches his conclusions, forms his judgments, conducts his life, in the great majority of instances, on evidence, the value of which depends entirely on the credibility in his opinion of the person who communicates the particular fact or statement to him. If the man in the street were,

by some mysterious law, precluded from receiving information except according to the rules obtaining in courts of justice, and of governing his conduct accordingly, life would be intolerable.

In the interesting and amusing book called *The Man in Court*, above noted, the writer remarks apropos of the attitude of an ordinary jury:

> During the trial a feeling of resentment of court procedure grows. It is not the judge any longer who is keeping and delaying them. The witnesses appear like fools, it is true, but the lawyers make them act more foolishly than need be. Why does the judge make such absurd rulings? The law must be an unreasonable thing and the judge evidently knows a great deal about it. *Why can't the witnesses tell what they know?* . . . . The strange part is that when a witness has said something and told how he or she feels about the case, *which is exactly what the jury want to know*, one of the lawyers jumps up and says he moves to strike that part all out, and the judge strikes it out.

It is obvious, therefore, that the investigation of this situation of the administration of justice cannot be fairly or profitably accomplished unless those who have the task in hand keep constantly in mind the popular view and even the popular prejudice with regard to the development of an ideal method of ascertaining the facts in regard to a dispute between litigants in courts of justice.

This problem of increasing the efficiency of our courts presents itself as a problem of loyalty, and warrants an appeal to the public as well as to the profession.

Mr. Elihu Root, in making his presidential address to the American Bar Association in 1916, commented upon the extraordinary increase in national efficiency as one of the most striking effects of the great war in Europe. And after pointing out with prophetic clearness that a similar development must take place in the United States he commented upon the great economic waste in the administration of law, the unnecessary expenditure of wealth and effective working power in effecting this particular function of organized society. After a humorous suggestion that a very considerable percentage of the 114,000 lawyers in the United States, as shown by the census of 1910, could well be spared to do the work on the farms of the country, he declares that the underlying cause of the defective administration of justice is,

> that the bar and the people of the country generally proceed upon a false assumption as to their true relation to judicial proceedings. Unconsciously, we all treat

the business of administering justice as something to be done for private benefit, *instead of treating it primarily as something to be done for the public service.*

He points out that, even with so large a leaven in our legislatures of men who are members of the bar, there is

a continual pressure in the direction of promoting individual rights, privileges and opportunities, and very little pressure to maintain the community's rights against the individual, and to insist upon the individual's duties to the community.

He adds,

There are, indeed, two groups of men who consider the interests of the community. They are the teachers in the principal law schools and the judges on the bench. With loyalty and sincere devotion they defend the public right to effective service, but against them is continually pressing the tendency of the bar and the legislatures, and, in a great degree, of the people, towards the exclusively individual view.

After commenting on some defects in the administration of justice under the procedural law as it stands, he observes:

A large part of the detailed and specific legislative provisions regulating practice is really designed to enable law business to be carried on without calling for exercise of discretion on the part of the court, and the evil results of the absurdly technical procedure which obtains in many states really come from intolerance of judicial control over the business of the courts.

And we quote with especial emphasis the following as justifying the general trend of our recommendations:

A clearer recognition of the old idea that the state itself has an interest in judicial procedure for the promotion of justice, and a more complete and unrestricted control by the court over its own procedure would tend greatly to make the administration of justice more prompt, inexpensive and effective. And this recognition must come from the bar itself.

IX Constitutional Changes

We address ourselves first to the root of the whole matter, namely, to the inquiry to what extent, and in what particulars, ought the Constitution of a state to deal with the administration of justice? What safeguards are essential, keeping in mind the American idea of the threefold functions of government by the people, legislative, executive and judicial? Are any of the present formulae outworn? Or, on the other hand, has experience shown the supe-

rior value of the once-discarded over the experiments of former readjustments?

And if the constitutional provisions are to be purely generic and not specific, then to what extent is that which is specific, but still demands formulation, to be formulated by the legislature, or to be left to the courts themselves?

The American Judicature Society issued in March, 1917, a second draft of a state-wide judicature act, known as Bulletin 7–A, the original bulletin being out of print. In the introductory note the draftsmen of this act commented on the fact that before such an act could become law in any state some revision of the Judiciary article of the local constitution would probably be necessary. This would be particularly true in such a state as New York. Certain measures of reform that have been suggested in that state have been met by the criticism of unconstitutionality. This was after an examination extending over a long period of time by a commission called the Commission on the Law's Delays, by the framing of statutes to carry out the recommendations of that commission and by the actual passage of such statutes. They were vetoed on that ground as contravening the scheme of administration of justice embodied in the constitution of the state. Notably was this the case with regard to speeding up the judicial machine by eliminating the burden laid upon judges of considering procedural and interlocutory matters through the intermediation of masters, appointed somewhat on the English plan. All such proceedings were to be sifted out by them and nothing left to be tried by the courts but issues of fact or of law. This particular measure was vetoed by Governor Odell on the report of the Attorney-General that it would deprive justices of the Supreme Court of powers which were vested in them by the Constitution. Singularly enough, it has developed, upon search, that this opinion is not on file.

Moreover, in the state of New York, certain courts have become known as "constitutional courts," having been either organized pursuant to some constitutional provision or having been recognized in the constitution as existing courts with a jurisdiction to be preserved unchanged, unless in some cases they were capable of being modified by legislative action, in respect of which express permission for action was reserved in the Constitution itself.

Our first task, therefore, and the task of greatest importance is

to suggest to the bar and to the people of the state, by means of a model Judiciary Article, the three fundamental principles of a complete reform:

(a) A uniform court;

(b) With administrative and disciplinary machinery inherent within that court; and

(c) Provision for reducing the volume of business and rendering the course of justice more expeditious and sure. We propose, therefore, the following Judiciary Article, each section being printed in bold face type and the discussion following immediately after each section as the text of our report.

Section 1.—Judicial Power; Re-constitution of courts.—The judicial power of this State shall be vested in the Court of the State of New York. In this Court the People may sue, and without further consent, be sued. Nevertheless, the legislature may provide for a court for the trial of impeachments and for the election and appointment of justices of the peace.

This conception of a unified court is not novel.[11] The state of New York has an elaborate articulation of judicial tribunals. The Supreme Court is a court of general jurisdiction. It holds special and trial terms. It had a criminal branch formerly known as the Oyer and Terminer but now superseded by the "Criminal Part" of the court. It has appellate terms composed of three justices, wherever that term exists, who hear appeals from certain inferior courts. It has an appellate division in each of the four judicial departments where several judges sit in banc and hear appeals from the Supreme Court and from the appellate term in certain cases, and from Surrogates' and County Courts. There is a court of last resort known as the Court of Appeals, which is itself by the Constitution a court of limited jurisdiction, and much of the agitation with regard to judicial reform has arisen by reason of the limitation of the right of appeal to this court of last resort.[12]

There are local courts known as City Courts in various parts of the state. With certain exceptions, there is a County Court in each county. There is a Surrogate Court in each county, although in certain counties the same judicial officer discharges the judicial

[11] See reference in Part II, p. 61, to English Judicature Acts.

[12] See Chapter 290, Laws of 1917.

duties of County Judge and of Surrogate. There are various criminal courts, courts of Special Sessions, General Sessions, Magistrates' Courts. Then there are, in some of the cities, Municipal Courts. Each of these various courts or divisions of courts has its special rules and practice, and such of the courts as are of special jurisdiction may be so closely limited, that when a cause has been finally reached for trial and is to be passed upon, it may develop that the court is without power to grant the relief desired and the litigant be refused relief or remitted to another forum perhaps after the statutory limitation has run against his claim. At the same time the courts of general jurisdiction are protected against the consideration of pecuniarily "small" matters that ought to be tried in the lesser courts. This is accomplished by provisions mulcting the litigant with costs if he improperly engage the attention of that court with the settlement of his petty dispute.

This idea of a uniform court, promulgated by the American Judicature Society, has also been urged by the National Economic League of Boston, the Phi Delta Phi Club of New York City, the so-called "Lawyers' Group for the Study of Professional Problems," in New York City, and as long ago as 1909 was recommended by a special committee of the American Bar Association. The proposition is to abolish all the existing differentiated courts of various jurisdictions and to vest the judicial power of the people in a Court of the State, into which all these existing tribunals shall be consolidated and taken up, with power, as below noted, to divisionalize itself and set up as many parts of first instance or of appeal, and if necessary, of intermediate and of final appeal, as may from time to time be convenient and necessary. These various parts are always to be subject to the control and order of the court itself, so that whenever a litigant having a claim shall bring another into court they shall find themselves in a tribunal adequate to adjust finally and once for all, their mutual rights, and to grant the remedy adequate for the determination of the controversy.

From the theoretical point of view, there obviously should be no maintainable opposition against this suggestion. The recommendation of the American Judicature Society represents a consensus of opinion from all over the United States of members of the bar and of students of the law who have given the matter the most mature consideration. The real objections, the rock upon

which the reform may strike and founder, are local, personal and selfish. It appears to strike at and abolish existing positions carrying emolument or salary, and therefore it is imperative to state at the outset that it need not necessarily do so. Assuming that there are two hundred judicial officers in a given state enjoying different grades of salary as judges of the different courts now existing in that state, it is obvious that such a constitutional reform (adopted by the people and consolidating them all into one court, to be known by a new name or by an existing name of a historic court), can take up into the activities of that court at the outset every existing judicial officer for the term for which he may have been elected, and at the salary payable to him at the time of this evolutionary change. On the other hand, there is an objection on the part of the existing judges of what may be called the higher courts. They now have a differentiation of dignity wholly independent of their larger salaries, which puts them on a plane above and apart from the judges, say, of a municipal or purely local court, and assuming the change to be effected, the various judges will be put upon a plane of judicial equality in that each will be the judge of a general court having power to grant relief and to hear disputes equal to that of every other judge of that court, save and except as the court itself by the machinery below suggested may assign different members of that court to duties in divisional parts. The jurisdiction of these parts may be determined from time to time by the rules of court rather than by a constitution or by a short practice act.

The answer to this objection is that this very fact will result in raising the standard for the selection of judges, whether by election or by appointment, to a common norm and the period of time for which any incumbents in office may still have to serve at the time the change goes through may be disregarded as negligible in view of the larger results to be ultimately achieved. Assume for the moment that a judge of the municipal court is by reason of the adoption of such a Judiciary Article by the people of the state made equal in glory to the judge of the court of last resort. At the same time the differentiation of functions may be preserved by the assignment of the one to a division of last appeal and the assignment of the other to a division of dispossess cases or cases involving no more than a given pecuniary amount.

It is proper to say that this committee takes issue here and

now with the proposition that there ought to be a poor man's court, in the sense in which that proposition is usually urged. Every tribunal of justice ought to be a poor man's court, that is to say, it should not be intended for any particular class of the community. The equality of justice is not subserved by remitting one man to a tribunal presided over by judges differentiated in honor and in respect and emolument from judges whose services are better paid, who are invested with greater jurisdiction and dignity and who are made available only for persons having controversies involving pecuniary amounts that the poor man cannot expect to control. The only differentiation that is consonant with the theory upon which courts of justice should be administered is one which is related to the expedition of business, so that causes which may be described as "short causes," causes which may be categorized under some generic classification, and are capable of being disposed of with a minimum of research and demand upon the time of either counsel or court, may be tried in such tribunals as may properly be erected as divisional parts of the court of the state, *i.e.*, causes not requiring the patient research and analysis, which, for example, a long accounting, or similar litigations may require. Nevertheless, if people were to be satisfied that a uniform court were desirable and would result in the better and more speedy administration of justice, the question of relative dignity or compensation of present incumbents of judicial office would have to be disregarded and not allowed to stand in the way of so great a step forward.

Section 2.—Existing courts abolished.—All the existing courts, both of record and not of record, are abolished from and after the last day of December, one thousand nine hundred eighteen.

All their jurisdiction shall thereupon be vested in the Court of the State of New York, and all actions and proceedings then pending in such courts shall be transferred to the Court of the State of New York for hearing and determination.

This section requires no amplification. It is the corollary of Section 1. It provides for eliminating any possible delay or prejudice to any litigants actually involved in suits or proceedings pending at the time of the change.

However, it is an interesting fact that this experiment of consolidation has already been tried in the state of New York with

the most satisfactory results, and that too over almost precisely the same objections as are put forward in discussing this general problem of a unified court. We refer to the change wrought by the Constitution of 1894 in consolidating into the Supreme Court the Superior Court and the Court of Common Pleas. Both of these courts existed and had high and honorable traditions, but they were courts of special and limited jurisdiction, and it had developed that there were cases, even with the powers that those courts possessed, where justice could not be effectually and completely secured by reason of the limitations on the power of the courts and of their judges in the cases coming before them. These courts were thus abolished or taken up into the Supreme Court and the existing judges became judges of the Supreme Court, remaining in office for the terms for which they had been elected or appointed, and their salaries were even made to conform to those of the other justices of the Supreme Court residing in the same counties. The judges affected by this change became some of the most efficient members of the Supreme Court bench and established reputations for learning and industry and efficient dispatch of justice not a whit below that of their associates on the Supreme Court bench. The experiment is, therefore, not a new one, and inconveniences and objections are negligible in view of the advantages in efficiency which this one experience and experiment justify us in believing would necessarily ensue.

Section 3.—Divisions of the Court of the State of New York.—The Court of the State of New York shall be organized into divisions, to include always a division of final appeal, and such divisions of intermediate appeal and divisions of first instance as may from time to time be necessary.

The divisionalizing of this court is required by the exigencies of judicial business. Such business has heretofore been dealt with by the legislature as requiring the erection of separate tribunals with special and limited jurisdiction; but the overlapping of jurisdictions, or the conflict of jurisdictions, or mistaken entry into one jurisdiction when the remedy desired could only be secured in another, have in great measure been responsible for the complaints against the administration of justice by disappointed or unsatisfied litigants. Under the divisionalization of a court each part of which had full power to grant adequate relief, no litigant having run his

course could be thrown out upon the very day of trial on the ground that he was in the wrong court. If under the rules a case should be properly disposed of by a judge assigned to a particular division, and had been reached before a judge in another division, it could be transferred without loss of time or other advantage and be forthwith disposed of.

The discussion under this particular section will turn entirely upon the propriety of providing in the Judiciary Article itself that there should always be a division of final appeal and divisions of intermediate appeal, on the one hand, and the general proposition that there should be such divisions of appeal, whether final or intermediate, as the court might from time to time by its order prescribe. It is not vital to this discussion that the question shall be disposed of at this time. The bar and the litigants of any particular state may differ as to whether a party has a right to more than one appeal, or if they agree that every litigant is entitled to one appeal whether that appeal shall be in all cases to the court of last resort. But it is proper to note that the scheme obtaining in the state of New York for what are called appellate divisions of the Supreme Court (to which appeals except in capital cases must go, and which shall serve as a sort of clearing house for appellate business, so that certain cases can never pass that court, whereas other cases may go up as a matter of right or as a matter of permission) is a scheme not generally obtaining throughout the United States and has resulted in certain cases in the complaint that, in the uncertainty as to whether a case was going to the court of last resort, a particular appellate division might not deal with the case in the same manner and with the same degree of care that they would have dealt with it, had it been certain that the case could go no further.[13] With this criticism of the appellate judiciary, in so far as it involves a charge of carelessness, your committee is not in sympathy and does not endorse the complaint, although it recognizes its existence. The point is that until the adjudication embodied in a judgment or final order of the particular appellate division is rendered, it may not develop

[13] The finality of the determinations of the appellate division and the consequent relief of the Court of Appeals have been emphasized by legislation enacted during the current year which, however, it is not necessary to discuss at length. It is remedial legislation, not curative. It does not strike at the "tap root" of the difficulty and complaint.

whether the case is to be affirmed or reversed and if reversed whether it is reversed on the law or on the facts, or on both, and the questions that emerge in regard to the right of appeal to the Court of Appeals have become involved in minute refinements of judicial decision. Special books have been written dealing exclusively with this question of appeals, and the whole matter is involved in technicalities beyond the grasp of the ordinary practitioner.

Suffice it to say that the scheme of intermediate appellate divisions and the limitation of appeals therefrom in certain cases was a device put forward in the constitutional convention of 1894 for the purpose of relieving the pressure on the Court of Appeals which was behind its calendar, and has been continued ever since. The arguments in favor of it are that it has resulted in the erection of tribunals of intermediate appellate jurisdiction of the highest dignity, ability and industry; nearly two hundred volumes of reports of their decisions have been handed down since the erection of these courts, each of these volumes running from 700 to 800 pages. But in certain cases the determination of these appellate divisions, on similar questions, have been conflicting, and there has been no assured method of resolving these conflicts of decision in cases where the particular litigant lacked the inclination or money or right to go to the Court of Appeals. On the other hand the contention of many is that there should be an enlarged Court of Appeals; and the objection to such a court is immediately made that when there have been "second divisions" of this court, or "commissions of appeals" set up, sitting concurrently to relieve it from an overcrowded calendar, there was the same possibility of conflicting decisions, and this possibility was an insuperable objection to the scheme of an enlarged court.

In answer to this contention it may very properly be urged that if there were but one court of last resort and no courts of intermediate appeal, and that court of last resort consisted of twenty-five or thirty members, then that court should sit in banc, by a majority, on all questions involving the life of citizens or questions of constitutional law, but that other appeals should be classified and categorized and should be heard before divisional parts of that court, consisting of seven or nine judges, three or more of whom should sit concurrently. There would be no conflicting determinations, and in any case that might seem to involve a possible conflict

of determination between one of these divisional parts and another, the rules of the court might prescribe that such divergencies in the two cases where the conflict developed should be submitted on the record to the court sitting in banc for its determination, and before the decision was published. To have one court of last resort sitting in parts, and they sitting coincidently, would multiply the output of determinations by that court directly in the ratio that the number of such parts bears to the present single session of a court of last resort. It would eliminate the necessity of the intermediate appeals; it would shorten the time within which the litigant could reach his final determination and it would lessen the cost to the litigant in professional fees and in the cost of preparing records for the two successive appellate tribunals.

But whether there be a court of last resort and intermediate appellate tribunals or only one Court of Appeals, the practical suggestion is that *that shall be a matter for the general court itself to determine.* It should, therefore, be vested with permissive power to divisionalize itself in the matter of appeals as in other matters as from time to time the exigencies of judicial business might require. The matter ought not to be foreclosed by the Constitution itself, nor ought it to be left to the legislature to determine by statutes or amendments thereto made from time to time, perhaps at the instance of parties having a particular axe to grind and a particular litigation which they desire either to end or to carry still further.

In the English Judicature Act there is provision made under which the "Court of Appeal" may sit in divisions and under which

> for all the purposes of and incidental to the hearing and determination of any appeal within its jurisdiction and the amendment, execution and enforcement of any judgment or order made on any such appeal, and for the purpose of every other authority expressly given to the Court of Appeal by this Act, the Court of Appeal shall have all the power, authority and jurisdiction by this act vested in the High Court of Justice.

It was also provided that,

> Every appeal to the Court of Appeal shall, where the subject-matter is a final order, decree, or judgment, be heard before not less than three judges of the said court sitting together, and shall, when the subject-matter of the appeal is an interlocutory order, decree, or judgment, be heard before not less than two judges of the said court sitting together.

And if any doubt arises as to what decrees, orders or judgments are final and what are interlocutory, the question is determined by the Court of Appeals as a body.

We simply cite these provisions of the English organization in order to show that our suggestions are not unheard of, nor unworkable.

Section 4.—Judicial departments.—The present four judicial departments of this State are continued, but the legislature may alter from time to time the boundaries thereof, except that the first judicial department shall always consist of the counties of New York and of the Bronx, and the others shall be bounded by county lines, and be compact and equal in population as nearly as possible. The present number of judicial departments shall not be increased.

There shall not be more than one division of intermediate appeal in each judicial department.

This section requires no amplification.

Section 5.—Chief justice and justices.—The Court of the State of New York shall consist of one chief justice and of as many justices as there are justices and judges in the existing courts of records, hereby abolished.

The chief justice shall be elected by the people of this State for a term of ———— years, and may be re-elected for one or more terms. Should the office become vacant during any term, the governor shall fill it by appointment for the remainder of the term.

The justices shall be appointed by the chief justice, subject to confirmation by the Board of Assignment and Control.

No person shall be elected chief justice nor appointed justice who has not been a member in good standing of the bar of this State for at least ten years.

The justices shall serve during good behavior or until they shall have attained the age of seventy years; but any justice who shall have served continuously for fifteen years and shall have attained the age of sixty-five years may apply to the Board of Assignment and Control to be retired, and, upon that Board certifying that the reasons assigned by him are sufficient, he shall be so retired.

The salaries of the chief justice and of the justices and of the official staff and of the members of the Committee of Discipline who are not justices shall be regulated by the legislature, but no salary of any justice shall be diminished during his term of office.

A justice, whose term of office shall after fifteen years of service cease by reason of age or retirement, shall receive an annual compensation equal to two-thirds of the salary he received during the last year of his term.

The Board of Assignment and Control may certify that the number of justices shall be reduced, and thereafter no vacancy shall be filled until the number shall be reduced accordingly. The number of justices shall not be increased except by the legislature upon application of the Board of Assignment and Control.

It is obvious that this section presents, in the state of New York at least, the most controversial point in this whole report. At the time of the Constitution of 1846 the state departed from the appointive and resorted to the elective judiciary system. And from the standpoint of the individual, local electors, the idea is abhorrent to them that they are not competent to select proper and efficient judges of their own causes. And today, as in the days when Rufus Choate made his memorable address to the Massachusetts Constitutional Convention of 1850, when the action of the people of the state of New York was still fresh in the memories of men, it is still true that the most insidious and yet unfair answer to the argument for an appointive judiciary is: Will you not trust the people? As he remarked in his address:

> That is a very cunning question, very cunning indeed. Answer it as you will, they think they have you. If you answer yes, that you are afraid to trust the people, then they cry out, "He blasphemeth." If you answer no, you are not afraid to trust them, then they reply, "Why not permit them to choose their judges?"

He undertook to solve the dilemma by what he characterized as "a safe general proposition":

> If the nature of the office be such, the qualifications which it demands, and the stage on which they are to be displayed be such, that the people can judge of those qualifications as well as their agents; and if, still farther, the nature of the office be such that the tremendous ordeal of a severely contested popular election will not in any degree do it injury,—will not deter learned men, if the office needs learning, from aspiring to it; will not tend to make the successful candidate a respector of persons, if the office requires that he should not be; will not tend to weaken the confidence and trust, and affectionate admiration of the community towards him, if the office requires that such be the sentiments with which he should be regarded,—then the people should choose by direct election. If, on the other hand, from the kind of qualifications demanded, and the place

where their display is to be made, an agent of the people, chosen by them for that purpose, can judge of the qualifications better than they can; or if from its nature it demands learning, and the terrors of a party canvass drive learning from the field; or if it demands impartiality and general confidence, and the successful candidate of a party is less likely to possess either,—then the indirect appointment by the people, that is, appointment by their agent, is wisest.

This statement was prefaced by that great advocate with a discussion of what constitutes the best judge, the good judge, the judge whom the people of the state should desire to put and maintain upon the bench. And because this oration is a milestone in the discussion of this subject and is hard for the average reader to find, we quote these classic passages:

In the first place, he should be profoundly learned in all the learning of the law, and he must know how to use that learning. Will anyone stand up here to deny this? In this day, boastful, glorious for its advancing, popular, professional, scientific, and all education, will any one disgrace himself by doubting the necessity of deep and continued studies, and various and thorough attainments, to the bench? He is to know, not merely the law which you make, and the legislature makes, not constitutional and statute law alone, but that other, ampler, that boundless jurisprudence, the common law, which the successive generations of the State have silently built up; that old code of freedom which we brought with us in the *Mayflower* and *Arabella*, but which in the progress of centuries we have ameliorated and enriched, and adapted wisely to the necessities of a busy, prosperous, and wealthy community,—that he must know. And where to find it? In volumes which you must count by hundreds, by thousands; filling libraries; exacting long labors,—the labors of a life-time, abstracted from business, from politics; but assisted by taking part in an active judicial administration; such labors as produced the wisdom and won the fame of Parsons and Marshall, and Kent and Story, and Holt and Mansfield. If your system of appointment and tenure does not present a motive, a help for such labors and such learning; if it discourages, if it disparages them, in so far it is a failure.

In the next place, he must be a man, not merely upright, not merely honest and well-intentioned,—this of course,—but a man who will not respect persons in judgment. And does not every one here agree to this also? Dismissing, for a moment, all theories about the mode of appointing him, or the time for which he shall hold office, I am sure, we all demand, that as far as human virtue, assisted by the best contrivances of human wisdom, can attain to it, he shall not respect persons in judgment. He shall know nothing about the parties, everything about the case. He shall do everything for justice; nothing for himself; nothing for his friend; nothing for his patron; nothing for his sovereign. If on one side is the executive power and the legislature and the people,—the sources of his honors, the givers of his daily bread,—and on the other an individual nameless and odious, his eye is to see neither, great nor small; attending only to the "trepidations of the balance." If a law is passed by a unanimous legislature, clamored for by the

general voice of the public, and a cause is before him on it, in which the whole community is on one side and an individual nameless or odious on the other, and he believes it to be against the Constitution, he must so declare it,—or there is no judge. If Athens comes there to demand that the cup of hemlock be put to the lips of the wisest of men; and he believes that he has not *corrupted the youth, nor omitted to worship the gods of the city, nor introduced new divinities of his own,* he must deliver him, although the thunder light on his unterrified brow.

This, Sir, expresses, by very general illustration, what I mean when I say I would have him no respecter of persons in judgment. How we are to find, and to keep such an one; by what motives; by what helps; whether by popular and frequent election, or by executive designation, and permanence dependent on good conduct in office alone—we are hereafter to inquire; but that we must have him,—that his price is above rubies—that he is necessary, if justice, if security, if right are necessary for man, all of you, from the East to West, are, I am sure, unanimous.

And, finally, he must possess the perfect confidence of the community, that he bear not the sword in vain. To be honest, to be no respecter of persons, is not yet enough. He must be believed such. I should be glad so far to indulge an old-fashioned and cherished professional sentiment as to say, that I would have something of the venerable and illustrious attach to his character and function, in the judgment and feelings of the commonwealth. But if this should be thought a little above, or behind the time, I do not fear that I subject myself to the ridicule of any one, when I claim that he be a man towards whom the love and trust and affectionate admiration of the people should flow; not a man perching for a winter and a summer in our court-houses, and then gone forever; but one to whose benevolent face, and bland and dignified manners, and firm administration of the whole learning of the law, we become accustomed; whom our eyes anxiously, not in vain, explore when we enter the temple of justice; towards whom our attachment and trust grow even with the growth of his own eminent reputation. I would have him one who might look back from the venerable last years of Mansfield, or Marshall, and recall such testimonies as these to the great and good Judge:

"The young men saw me, and hid themselves; and the aged arose and stood up.

"The princes refrained talking, and laid their hand upon their mouth.

"When the ear heard me, then it blessed me, and when the eye saw me, it gave witness to me.

"Because I delivered the poor that cried, and the fatherless, and him that had none to help him.

"The blessing of him that was ready to perish came upon me, and I caused the widow's heart to sing for joy.

"I put on righteousness and it clothed me. My judgment was as a robe and a diadem. I was eyes to the blind, and feet was I to the lame.

"I was a father to the poor, and the cause which I knew not, I searched out.

"And I brake the jaws of the wicked, and plucked the spoil out of his teeth."

Give to the community such a judge, and I care little who makes the rest of the Constitution, or what party administers it. It will be a free government, I

know. Let us repose, secure, under the shade of a learned, impartial and trusted magistracy, and we need no more.

And now, what system of promotion to office and what tenure of office is surest to produce such a judge? Is it executive appointment during good behavior, with liability, however, to be impeached for good cause, and to be removed by address of the legislature? or is it election by the people, or appointment by the executive for a limited term of years?

The Chief Justice, elected by the people, is their "agent," in the meaning of Mr. Choate's great argument, no less than is the chief executive of the state.

At the same time Rufus Choate called the attention of that Convention to the discussions in *The Federalist*[14] in which the pur-

[14] "That 'there is not liberty, if the power of judging be not separated from the legislative and executive powers.' It proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that, as all the effects of such an union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced by its coördinate branches; that, as nothing can contribute so much to its firmness and independence as *permanency in office*, this quality may therefore be justly regarded as an indispensable ingredient in its Constitution; and, in a great measure, as the *Citadel* of the public justice and the public security.

"The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

"Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable.

"There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal, that the servant is above his master; that the representatives of the people are superior to the people themselves; that men, acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

"If it be said that the legislative body are themselves the constitutional

pose of an independent judiciary is vindicated, and appointment during good behavior as the means of such independence is vindicated also, and he had recourse to observations which strike at the root of the dissatisfaction popularly entertained of such acts of the

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judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A Constitution is, in fact, and must be, regarded by the judges as a fundamental law. It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

"Nor does the conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the Constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

"This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction be reconciled to each other, reason and law conspire to dictate that this should be done. Where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an *equal* authority, that which was the last indication of its will should have the preference.

"But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate

judiciary as for the moment arrest and interfere with the will of the people, as expressed by their legislatures from time to time, by virtue of that interpretative power vested in the judiciary of determining whether a given statute runs counter to the Constitution of the state or of the United States. Mr. Choate observed:

Sir, it is quite a striking reminiscence, that this very paper of *The Federalist*, which thus maintains the independence of the judiciary, is among the earliest, perhaps the earliest, enunciation and vindication, in this country, of that great truth, that in the American politics, the written Constitution—which is the record of the popular will—is above the law which is the will of the legislature merely; that if the two are in conflict, the law must yield and the Constitution must rule; and that to determine whether such a conflict exists, and if so, to pronounce the law invalid, is, from the nature of the judicial office, the plain duty of the judge. In that paper this fundamental proposition of our system was first presented, or first elaborately presented, to the American mind; its solidity and its value were established by unanswerable reasoning; and the conclusion that a bench, which was charged with a trust so vast and so delicate, should be as independent as the lot of humanity would admit—of the legislature, of the executive, of the temporary popular majority, whose will it might be required thus to subject to the higher will of the Constitution, was deduced by a moral demonstration. Beware, Sir, lest truths so indissolubly connected—presented together, at first:—adopted together—should die together. Consider whether, when the judge ceases to be independent, the Constitution will not cease to be supreme. If the Constitution does not maintain the judge against the legislature, and the executive, will the judge maintain the Constitution against the legislature and the executive?

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the converse of that rule as proper to be followed. They teach us, that the prior act of a superior, ought to be preferred to the subsequent act of an inferior and subordinate authority; and that, accordingly, whenever a particular statute contravenes the constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former.

"It can be of no weight to say, that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise *will* instead of *judgment*, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved anything, would prove that there ought to be no judges distinct from that body.

"If then the courts of justice are to be considered as the bulwarks of a limited Constitution, against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judgments, which must be essential to the faithful performance of so arduous a duty."—*The Federalist*, number LXXVIII, New York, June, 1788.

What the working of this principle in the national government has been, practically, there is no need to remind you. Recall the series of names, the dead and living, who have illustrated that bench; advert to the prolonged terms of service of which the country has had the enjoyment; trace the growth of the national jurisprudence; compare it with any other production of American mind or liberty; then trace the progress and tendencies of political opinions, and say if it has not given us stability and security, and yet left our liberties unabridged. . . . .

It will be recalled that Montesquieu, in emphasizing the necessity for a separateness between the executive, legislative and judicial branches or functions of government, nevertheless allowed that in the British Constitution, which was his great model, there were certain features which might be described as "coöperation in certain rights" between the various separate branches of authority.

In *The Federalist* Alexander Hamilton interpreted the proposition laid down by Montesquieu as amounting to no more than this, "That where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free Constitution are subverted." And he points out in the Constitutions of the different states, that New Hampshire's, which was the last to be framed, recognized "the impossibility and inexpediency of avoiding any mixture whatever of these departments"; and qualified the doctrine by declaring that "The legislative, executive and judicial powers ought to be kept as separate from and independent of each other as the nature of free government will admit; or as is consistent with that chain of connection that binds the whole fabric of the Constitution in one indissoluble bond of unity and amity." On the other hand, he points out that the Constitution of Massachusetts declares, "That the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative or judicial, or either of them: the judicial shall never exercise the legislative or executive, or either of them."

The Constitution of New York, however, at that time contained no declaration on the subject but gave nevertheless to the executive a partial control over the legislative, "and what is more, gives a like control to the judicial department and even blends the executive and judiciary departments in the exercise of this control." So that in respect to certain appointments the members of the legislative are associated with the executive authority in the appointment of both

executive and judiciary officers. And its court for the trial of impeachments and corrections of error is to consist of one branch of the legislature and the principals of the judiciary department.

Upon re-reading Section 5 above, in the light of the foregoing, your committee hopes that the idea will at once strike the reader that the suggestion here made that the chief justice of a state, the primary judicial officer of the Court of the State, being elected by the people for the primary purpose of appointing the judiciary of the state from time to time, will harmonize the difficulties that at one time emerged through the dedication of the power of appointment to the executive; and at the same time preserve to the people the fundamental right, inherent in our system of government, of dominating the judicial branch of our government by the right of election at its source, and yet preserve the independence of the judiciary by not making them subject to the occasionally arbitrary will of the executive or to the influence of political considerations or emergencies, thus removing once for all partisanship from the serious matter of selection of judicial candidates, in short, of insuring the selection of that type of judges visualized by Mr. Choate in his incomparable vision.

We have given careful consideration to the proposal submitted in 1916 by the New York Short Ballot Organization to the legislature of that state. It suggests nominations to the people by the Governor, four weeks before the time closes for nominating judges. The purpose is to create "a judiciary that is ordinarily appointive (in effect) but with the appointments subject to challenge, and to confirmation or rejection by the people."

The proposal comments on the fact that in the Constitutional Convention of 1915 the fight for a return to the appointive system was lost. But the people rejected the work of the Convention *in toto*, so that no such deduction is fair. But every argument leading up to the recommendation of a change in the method of selecting judges applies in favor of our recommendation. We quote only one paragraph to prove this. If you read "Chief Justice" for "Governor" this is shown by Paragraph III, which reads:

III A more responsible method of nomination will give to the people better control over the judiciary than they now possess, inasmuch as it is far easier for the people to get the kind of Governor [read: chief justice] they want and thereby automatically secure the corresponding kind of judges than it is for them to have

to stand guard over their interests in every separate judicial contest amid the confusion of political campaigns. This constitutes in brief our answer to those who allege that we are trying to take away from the people the choosing of judges, a statement based on the superficial assumption that to have an officer *elected* by the people is equivalent to having that officer *chosen* by the people. There are still many who deceive themselves by failing to see that in a given case the appointive way may be more democratic than the elective way, and it was, of course, this instinctive, unreasoning opposition to cutting out the unworkable sections of the elective list that made the whole Short Ballot movement necessary. Democracy does not mean having the people *elect* everybody, it means having the people *control* everybody.

What are the practical features of the subject contained in this section?

The election of the chief justice by the people.

In relation to this it may be said that the highest and best result could be achieved if that were a separate election, held in the spring of the year on the expiries of the terms of office. The election of such an officer would engage the attention and interest of the bar to a degree never before realized and the bar would exercise its influence and its ability to choose in a manner not at present possible.

No one could hope to secure the nomination to so important an office who was not, equally with the Governor of the state, a man of outstanding reputation and learning, and, additionally, of standing at the bar. While the duties of his office would be selective and administrative, rather than judicial, under the structural scheme elaborated in these recommendations, nevertheless the position would be the highest attainable by a member of the bar of the state, in dignity, in influence and importance.

No man, however great his practice or income, could afford to disregard the summons of his brethren of the bar that he should place himself at the head of this great coördinate branch of the government of the state. And so high should be the office in dignity, emolument and influence, that the man of petty disposition, the man purely partisan, the schemer, the politician, the practitioner upon whose career any blot of suspicion or distrust may have rested, could not successfully aspire to or attain it.

It is idle argument to say that to create a chief justice with powers of appointment so far-reaching would be to throw the judiciary into politics. It begs the whole question. If the President of the United States can be trusted to appoint the judiciary of the fed-

eral bench, presumably the Chief Justice of the United States could be similarly trusted, and yet we know that the executives of the nation and of the several states have often made appointments for particularly personal reasons, and the temptation and the risks of yielding to such temptation would be far greater when exercised by one not committed to a particular career, but still engaged in his progress toward further and perhaps higher political honors and desirous of welding together a support and adherence that will facilitate his further progress. The chief justiceship of the state would represent the summation of a career, the highest and best gift of the profession, and by the simple device of permitting the chief justice to continue as an officer of the court or of retiring full of honors, ability, any lawyer or judge, though garbed in the cloak of poverty, might still covet and enjoy so high a position.

It must be borne in mind that Section 5 provides that the appointments, by the chief justice, are to be "subject to confirmation by the Board of Assignment and Control."

On the other hand, it is obvious at the outset, that if such a change were to be effected, the first chief justice of a given state would only enjoy this right to appointment in the case of individual judges of the various courts consolidated into the court of the state as their several terms of office to which they may previously have been elected should fall in by expiration, or by death; that is to say, the power would be, from the very beginning, a limited one and would involve the selection of persons qualified to succeed to the outgoing or deceased judge in the particular tasks to which he may have been assigned, and the duties which he was discharging. Surely a chief justice would be more competent to make more proper selections in the ordinary course than a governor, regardless of the fact that such chief justice as well as the Governor, might be from time to time the exclusive choice of a party rather than of the people of the whole state. The fact remains, and it ought to be recognized, that in a matter of such importance the bar of the state as a rule would have little difficulty in selecting the man to whom, above all others, such a gift as the nomination to this office, ought to be proffered.

It may as well be noted in this connection under the subdivision as to serving during good behavior, that it is the theory of this unified court that it shall be self-disciplinary.

We recognize the judge to be a public officer and as a public officer he should be subject to impeachment in the name of the people, *in the same manner as any other public officer.* It is proper that there should be a court for the trial of such impeachments but it ought to have its place in that part of the Constitution or statutes of the state which relates to public officers, and not in a Judiciary Article. *The court for the trial of impeachments is not a court of justice; it is a tribunal of the people.* The considerations that move the manifold constituents of that tribunal are usually political. It is only in cases of the utmost scandal, where the patience of the public has been exhausted by the acts of a corrupt and venal judge, that the determinations of such tribunal may be characterized as just and impartial. In many cases the determinations of such tribunals are unsatisfactory, even where they result in driving from the bench one against whom charges have been preferred. The power to remove from its body an unfit judge for good and sufficient reason, and upon hearing duly had, ought to be vested in the court itself, and we refer accordingly to Section 10 below dealing with the subject of discipline of members of the bench and of the bar alike by a board or committee of the court, having jurisdiction exclusively of questions of that character. Apart from such cases, judges should serve during good behavior, and in order that the career of a judge may be a career, he ought to be able to look forward, at the expiration of his service, when he is full of years, to a continuation in part, at least, of the support upon which he has had to rely and not be required to reënter the practice of the law, rendered precarious by his age, although in many cases it might be rendered profitable by his experience gained upon the bench. In the state of New York the device of official referees is a recognition of the value and importance of the pension system, although adopted in the face of an outstanding prejudice against any such pension system.

Once the initial step has been taken, the number of judges being at that moment determined by the experience of the people up to that time, and all the existing judges taken up by the process of consolidation into the new court of the state, they will be grouped by the Board of Assignment and Control to the discharge of the various divisional duties which the court itself may have determined to be necessary, differentiating these parts according to their jurisdiction and function and assigning the existing judges to the con-

tinued performance of those duties they have immediately been discharging. As these judges die, or their then terms of office expire, the court by the same Board may determine that successors need not be selected, thus reducing the number of judges if the amount of business does not require their continuance. But it is provided by the last clause of the section that the number of judges shall not be increased, except at the direction of the people, expressed through the legislative will.

It will be noted, finally, in this connection, that the term of office of the chief justice of the state can be made short. Two considerations lead to this recommendation: First, the office is intended to appeal to the leader of the bar for the time being, a man necessarily in most cases advanced in years, and upon whom the burden of his office should not be too long laid; in the second place, it recognizes the idea of accountability to the people and that they thereby will be afforded an opportunity in respect of their control of the judiciary branch of their government, to call, through the chief justice, the administration of justice to account at stated intervals by voicing anew their choice of the one through whom that control is exercised.

Section 6.—Annual convention and special meetings of the justices.—The justices shall convene annually in January to elect the Committee of Discipline, a presiding justice of the section of appeal and presiding justices of the divisions of intermediate appeal, if any be organized in the several judicial departments, and to determine any matters relative to the Court of the State of New York that it is within their province to determine. They will also elect one justice from each judicial department to serve on the Board of Assignment and Control.

The Board of Assignment and Control may at any time call special meetings either of all the justices or of the justices of any judicial department.

Section 7.—Removal or impeachment of justices.—Justices may be removed by the Board of Assignment and Control upon the certificate of the Committee of Discipline, specifying the unfitness or unworthiness of the justice requiring such removal and certifying the record of the hearing of the charges against him.

Justices may also be impeached in the same manner as any other public officer.

This section recognizes the fact that a judge is a public officer. And his impeachment ought to be on the same basis as the impeachment of any other public officer and therefore a court for the trial of impeachments, if such court is to have power to try any public officer, should have power to try all public officers, and it should not therefore be a tribunal written into the judiciary article, but into the article dealing with public officers. In the very nature of things such a court is not a court, it is a tribunal. It is an unwieldy body. It has powers and limitations which are not general to courts as such. It involves a machinery and makes claims upon the time and service of men whose primary service is to do something else, which circumstance alone is enough to account for the generally unsatisfactory course of its proceedings and the nature of its arbitraments.

Section 8.—Masters.—The Board of Assignment and Control shall have power to direct the appointment of masters to dispose of procedural, interlocutory or supplementary matters, with such powers and for such terms of office as it shall by general rule prescribe, and it may determine the number of masters in the several judicial departments.

The chief justice shall appoint, subject to confirmation by the Board of Assignment and Control, as masters, members of the bar in good standing who shall reside in the judicial department in which they are appointed and who shall have been admitted for at least seven years.

The legislature may prescribe the salaries of the masters, which may vary in the several judicial departments, but, in the absence of action by the legislature, the salaries of the masters may be prescribed and varied by the local fiscal municpal boards in the several counties, upon certificate of the Board of Assignment and Control.

It may appear in studying this proposed section that it diverges from the fundamental rule for the framing of a judiciary article that it shall be generic and not deal with details. This report, however, deals primarily with the jurisprudence of the state of New York. And in that state it has been determined by executive authority, acting on the advice of an attorney-general, that this particular method of speeding up the judicial machine is unconstitutional. Your committee is so convinced of the value and importance of this particular method of expediting justice and of relieving the strain upon judicial officers, that we have inserted it among the sections of

a judiciary article although differing from the opinion of the attorney-general above referred to and believing that the same result could be achieved by legislative enactment, *e.g.*, in a Short Practice Act. The only reason for inserting it in a judiciary article is that these officers must be paid, that their salaries will be a county or state charge and that the fact must not be disguised that from this body of officers, selected in the manner described in this proposed judiciary article, there will develop material available for selection from time to time to fill vacancies in the body of the judiciary itself. Irrespective, however, of these considerations, it is essential that the nature of this reform should be carefully set forth, and we can do so no better than by quoting from an English authority secured by Mr. Choate when he was Ambassador to the Court of St. James, for the purpose of aiding the Commission on the Law's Delay, at that time appointed by the legislature for the purpose of considering methods of reform. This commission had analyzed the state of litigation in New York and it had gotten together a mass of statistics, which later and in another form was summarized by Mr. Charles A. Boston in a paper in which he demonstrated that of the bulk of our judicial decisions more than 50 per cent thereof were concerned with matters of procedural and interlocutory detail.[15] In the discussion on legal efficiency above referred to, it was urged that if judges could be confined to the determination of issues and deal with the rights of parties, while all interlocutory and preliminary matters were to be urged and adjudicated before these masters by means of the "summons for direction" and "summons for judgment," as used in England, the greatest step forward in the simplification and expedition of practice would be achieved. Briefly summarized, this system pours into the test tube of "issue joined" the quick solvent of prompt omnibus interlocutory relief and pre-

[15] At the request of the American Bar Association, Mr. Frank C. Smith made an examination of the general digests for the first quarter of 1910 to determine what proportion of the reported cases related to matters of procedure. His report shows that more than one-half of all the points ruled on during that period of time by the state and federal courts of the United States related to matters of practice and procedure, and less than one-half of the points to matters of substantive law. The table which he prepared was printed in the Docket for March, 1917, and showed a total of 5,927 cases, in which 22,986 points were presented for adjudication, 12,259 of which were points on practice, *i.e.*, adjective law, or 53.32 per cent which, by comparison, he figured to be an increase of 5.07 per cent.

cipitates at once the "bad faith defendant" or the "hold up plaintiff" and leaves the pure crystals of definite, specific, *bona fide* issues, with which the court has to deal.

The preliminary work up to the threshold of the trial is conducted by an efficient staff of Masters. They must be members of the bar, or solicitors, of over ten years' standing. The position is one of importance and dignity and is highly prized. From the time a writ is returnable until issue is finally joined, the Masters deal with the proceedings, and it is impossible to overrate the efficiency, celerity and usefulness of their work. If a defendant fails to enter an appearance the plaintiff may take his judgment before a Master. If the plaintiff is suing for a liquidated sum, for a tradesman's bill, for instance, or upon a promissory note, or even for the rent of premises, or the possession of land, he may endorse upon his writ the nature and amount of his demand. Immediately upon the entry of appearance by the defendant, which must be within eight days, the plaintiff may take out a *summons for judgment*, which is returnable in four days. This summons is heard by a Master and immediately disposed of, the evidence being confined to a brief affidavit by the plaintiff that the money sued for is due and payable and that the defendant has no defense to the action, and the affidavit of the defendant stating his defense. If the Master is of opinion that the defendant's affidavit does not disclose a meritorious or substantial cause of defense he at once gives judgment for the plaintiff. If he is of opinion that the defendant has some answer to the plaintiff's demand three or four courses are open to him: (a) he may, if the parties consent, try the case himself, in which event the hearing will be without pleadings, and upon oral evidence, in the Master's private room; or (b) he may, whether the parties consent or not, put the case in the "Short Cause List," to be heard, probably during the ensuing week, by a judge in open court, and in this case also, without pleadings and upon oral evidence; or (c) he may give leave to defend upon the condition that the defendant forthwith pay the sum in dispute into court, or unconditionally, and in such case the action will take its usual course.

It will thus be seen that in every instance where a plaintiff is suing upon demand of this nature (and in every country the bulk of litigation must be of this character) *final judgment may be obtained within from two weeks to a month from the date of the service of the writ.*

In all other actions on contract, and in tort, the plaintiff is compelled before taking any step in the action, other than an application for an injunction, or for a receiver, or the entering of judgment in default of defense, to take out a "*summons for directions.*" This is returnable within four days and is heard by one of the Masters, who has power thereon to direct whether or not there shall be pleadings, and the place and mode of trial, and also whether there shall be "particulars," admissions, discovery, interrogatories, inspection of documents and commission for the examination of witnesses. All of these things are open to the application of either party and are granted or refused in the discretion of the Master. If he directs pleadings he may at any time subsequently, if he is of opinion that such pleadings do not sufficiently state what the respective parties' contention will be at the trial, order that particulars be given of any averment. For example, if an agreement is alleged he will order that its date be given, and whether it was oral

or in writing, and if it is oral who it is alleged it was made between, and if in writing that the document be identified.

The Master has also power to order each party to make a list of all documents in his possession which are material to any question in issue in the action, and to permit his opponent to inspect and take copies of such documents. This disclosure is technically known as "discovery of documents," and undoubtedly tends to save expense and shorten litigation. The Master may, furthermore, order either party to answer on oath before the trial certain questions submitted by his opponent, upon the terms that if the party to whom the interrogatories are addressed is the plaintiff, the action be stayed until he answers them, or, if defendant, that, in default of answering, his defense be struck out.

Finally the Master has power upon the application of either party to strike out the whole or any part of a pleading which he deems irrelevant, or he may give leave to enter judgment if the defendant by his defense admits the statement of claim.

The proceedings before the Master are of the simplest kind. He sits behind an office table in his room, and the solicitors or counsel who appear to support or oppose summons, stand before him and argue their points in a conversational tone. In this business-like way he gets through twenty or thirty cases in the course of a day, and although his decisions may involve summary judgments for thousands of pounds, his orders are made while the parties are before him, being endorsed upon the summons itself. There is an appeal from him to a judge who sits in Chambers to hear such appeals, but in the great majority of cases the decision of the Master is final.

It is hard to add anything to the definiteness of this description. It must be frankly stated that one of the addresses made before the New York State Bar Association in Brooklyn in 1917 pointed out certain respects in which the system in England was not working to complete satisfaction. But in the metropolitan districts of the state at least, where the congestion of business is the most notable, the permission to appoint and use such Masters is, in the judgment of your committee, essential to a scheme of reform, and it ought not to fail of being made available by any sin of omission on our part.

Section 9.—The Board of Assignment and Control.—The administrative business of the Court of the State of New York shall be conducted by the Board of Assignment and Control composed of the chief justice, the presiding justice of the section of appeal and of one justice from each judicial department elected annually. Every power adequate to that end is hereby conferred upon it.

It shall promulgate rules for conducting the judicial business of the Court of the State of New York, and may prescribe common forms for use therein. In the absence of action by the

legislature it may prescribe rules of evidence. It shall from time to time define the number and jurisdiction in civil or criminal matters of the several divisions of the Court of the State of New York and prescribe the parts and terms thereof, and assign justices to service therein.

It shall act without delay upon all appointments of justices and of masters made by the chief justice under Sections 5 and 8 hereof.

It shall provide for the appointment of the official staff of the Court of the State of New York, except that each justice may, subject to its approval, appoint his own private secretary and confidential attendant.

It shall prescribe requirements of character and attainments for admission to the bar, including the oath of office, and shall admit those applicants who shall comply therewith.

It shall certify annually to the legislature such judgments against the people of this State as may require an appropriation.

The chief justice shall be the chairman of the Board of Assignment and Control.

By this section the great judiciary system of a state is made self-administering. The people control the purse strings, the local supervisors or a board of estimate and apportionment together with the legislature control the budget and can limit extravagance, but in the matter of making the court machinery efficient and to that end having the power to control and regulate the conduct of every unit in the working force, the judiciary system is put upon a business basis. The only question is whether or not civil service rules ought not to yield to the operation of such an administrative system, for in a matter where the rights of a community are involved, the right of a man to a job under some hard and fast civil service regulation ought to yield to the public convenience. The head of the police force, for example, dismissing a subordinate for disobedience or inattention to duty, ought not to be compelled on a writ of *certiorari* to reinstate such insubordinate subordinate, for both discipline and efficiency are thereby very seriously impaired. It ought not to be impossible to adjust the operation of a reasonable civil service system to the efficiency of a court which, after all, in its ultimate analysis, is an agency of the community for the administration of justice, and not merely a forum or amphitheatre for the settlement of personal disputes.

Section 10.—Committee of Discipline.—The justices shall elect annually a Committee of Discipline composed of five justices and of two members of the bar who shall have been admitted for at least fifteen years.

The Committee of Discipline shall maintain discipline among the justices, the masters, the official staff and the members of the bar, and, for that purpose, shall have power, after due hearing, to censure, either privately or publicly, fine or suspend any master or any member of the official staff or of the bar, to remove any master or any member of the official staff, to disbar any member of the bar, and to recommend to the Board of Assignment and Control the removal of any justice.

The chief justice shall be ex officio a member of the Committee of Discipline, and shall be its chairman.

Here again we have the same feature in its more specific aspect. The judicial body corporate is given the power to purge itself of unfit and unworthy membership. The advantage of a self-disciplining machinery over the unwieldy and dilatory process of a trial before a court for the trial of impeachments lies in the fact that in the majority of cases of a judge against whom it was charged that he was unfit, for whatever reason, to continue to administer justice in the community, he might be prevailed upon by the Committee of Discipline, except in the most flagrant case, where the disciplinary proceedings should take their full course, to resign and to avoid the scandal incident to the prosecution of a public officer for conduct unworthy of his office. It might be said, on the one hand, that no plan should be supported that would enable such scandals to be hushed up, and that it is a great object lesson to the community when any representative body of its citizens rebukes and eliminates from its membership one who has been guilty of unworthy conduct. On the other hand it may be asserted that one such experience is sufficient as an object lesson in any one generation. But the object lesson loses its entire value and validity if it results in the particular complaint being resolved into a political contest and into an alignment of votes on the question of unfitness, conditioned, not by the facts of the case, but on partisan or other political considerations.

In the second place, it should be noted that this Committee on Discipline is to consist not only of justices of the court, but of members of the bar and is to have power to deal with members of the bar who are accused of unprofessional conduct. As a matter of

interest to readers outside of the state of New York, it may be noted that the activity of certain committees of the bar in the city of New York since the date of the promulgation of the Canons of the American Bar Association has been most commendable, *but at the expense of these associations*, in weeding out from their membership, on complaints made upon the proper judicial authority, men accused of various forms of professional misconduct, so that for this particular period there has been an unusual number of decisions in the reports of the state of New York of attorney cases, resulting in censure, suspension, disbarment. In many cases there has been a complete vindication and rehabilitation of the accused lawyer, for it is equally the function of such a disciplinary tribunal to protect the honorable and reputable member of the profession against injury or hold-up attacks as to rebuke and punish the man who has violated his oath of office.

In the third place, it may be stated that once we concede that the judiciary of a state is to be a great business administrative body with a primary duty of administering justice, but with these necessary, coördinate and subordinate functions and duties, then it becomes proper to contend that there may be men appointed to the judiciary for the express purpose of being assigned to these administrative or disciplinary functions, so that the judges constituting the Board of Organization and Control, or the Committee of Discipline, may be assigned upon their appointment specifically to these functions and may never have to sit at all, except in emergencies, in the trial of causes, or in the hearing of appeals. It is obvious on the other hand that judges who have "done their bit" in the trial of causes or in the appellate work of this court may on passing the age of sixty, with their ripe experience and acquaintance with the members of the bar in their particular community, be assigned to the execution of these governing and disciplinary powers and relieved of the confinement and stress of the daily court work, and may in this way perhaps, render to the bench and to the profession the supreme service of which they are capable.

Section 11.—Justices of the peace.—The legislature may provide for the election or appointment of justices of the peace throughout this State except in cities of the first and second class, and may prescribe their jurisdiction and a method for reviewing their acts, but the powers of the justices of the peace

shall in no case be greater than the powers of the existing courts of the justices of the peace, hereby abolished.

The insertion of this section is apparently inconsistent with the general scheme of the whole proposed judiciary article, and yet it is an essential part of a satisfactory judicial scheme.[16] And this is so because of the very reason suggested by our observations above with regard to the tendency to erect rough-and-ready tribunals for the expeditious settlement of disputes between members of the community. It is very much in line with the rules of the New York municipal court above referred to, providing for the arbitration or conciliation of controversies. The justice of the peace is an institution rather than a tribunal. The powers that are conferred upon him by the legislature enable him to assist the machinery of government in the imposition of fines, and he acts as a shock-absorber to the courts in his ability to dispose in a rough-and-ready way of controversies which might otherwise assume larger proportions, and engage the time and attention of more important functionaries. In rural communities, where the court house is not easily available to those residing in a large county, the resident justice affords a method of dealing with petty and irritating disputes that has on the whole proved satisfactory in the experience of the community. At the same time it must be conceded that providing for such justices of the peace in a constitutional, judiciary article of the nature here propounded, is only warranted logically in a permissive form. It is obvious that the legislature in providing a method for reviewing their acts would naturally, as they have done in the case of workmen's compensation acts, impose upon the Supreme Court or the Court of the State in its proper appellate division or part, the duty of correcting such errors as might be permitted to be taken up on appeal.

Section 12.—Statutes, decisions and judicial statistics.—The legislature shall provide for the speedy publication of all statutes and of such decisions and judicial statistics of the Court of the State of New York as the Board of Assignment and Control may from time to time require by its certificate to the Secretary of State; but all statutes and decisions shall be free for publication by any person.

[16] See article in this issue by Herbert Harley, relating to these functionaries, and how their efficiency may be increased.

Some of the more far-sighted of those who have been working for reform in the administration of justice have insisted that the collation and publication of information in regard to the business of the courts, as with regard to the performance of duty by any other servants of the public, will itself result in a better administration and in so far as it has been possible in various communities to secure the publication of judicial statistics, in identical degree the courts themselves, confronted with the result of their labor and contemplating the residuum of work undisposed of at the end of a definite period have devised the means and machinery for expediting the discharge of their duties and making the courts more efficient. Therefore this is a most vital clause in the suggested plan of readjustment.

> **Section 13.—Present Justices and Judges.—The justices and the judges of the existing courts of record, hereby abolished, shall become justices of the Court of the State of New York to serve for the remainder of the terms for which they have been severally elected or appointed, during good behavior, and with such duties as may be assigned from time to time to each by the Board of Organization. The present salary of no such justice or judge shall be reduced during the term for which he has been elected or appointed.**

The only question in regard to this section might arise in the provisions that the judges taken over from the existing courts for the terms for which they were elected by the people might be unfavorably affected by the words, "during good behavior," and be subjected to a new disciplinary process which might terminate their enjoyment of the office before the expiration of the term for which they were elected. Assuming but not conceding this to be true, it is better that there should be a possible case where it might be claimed that the right of the judge to the office had been in some way violated and that he should have some claim for compensation, if he could find a court to endorse and effectuate such claim, after he had been removed for misconduct, than to amplify, enlarge or make too specific the section of the new Constitution.

If the people have the power by an amendment of the Constitution to abolish a court, to consolidate several courts, or to create new courts, it is obvious that by the same power they may terminate the enjoyment of office by existing officials. The supposed

case is not likely to occur, but in order that the court may readjust its new business and continue unhindered the disposition of existing business and equally in order that it may divisionalize its various functions so as to dispose of all grades of judicial business engaging the attention of all the consolidated courts at the moment of their change, it is fitting and appropriate that all the existing judiciary should be taken up into the new court of the state.

Section 14.—The Board of Organization.—The chief judge of the existing court of appeals and the presiding justices of the several appellate divisions of the existing supreme court, or their successors, together with three members of the bar who shall be in good standing and shall have been admitted at least fifteen years and who shall be appointed by the chief judge of the existing court of appeals, are hereby constituted the Board of Organization which shall consolidate all the existing courts of this State into the Court of the State of New York.

It shall adopt a seal for the Court of the State of New York, shall transfer to the Court of the State of New York all the business and records of the existing courts, and shall assign such of the clerks, officers and attendants of the existing courts to duty in the Court of the State of New York as may be requisite to preserve the continuity of the existing judicial business.

In organizing the Court of the State of New York, it may exercise any or all of the powers hereby conferred on the Board of Assignment and Control, and it shall continue in office until the Board of Assignment and Control shall be organized. It may appoint a secretary and employ all necessary legal and clerical assistance.

The chief judge of the existing court of appeals shall be the chairman of the Board of Organization.

This section is a section of temporary operation, but absolutely imperative. There must be some body charged with the duty of effectuating the transfer of business, the organization of the court and the adoption of a seal, the assignment of clerks, officers and attendants, the doing of any act "requisite to preserve the continuity of existing judicial business."

Section 15.—Procedure.—The statutes regulating the organization and procedure of the existing courts and the rules of the several existing courts shall become rules of the Court of the State of New York, subject to the provisions of Section

9 hereof, but the said statutes as statutes are repealed as of the last day of December, one thousand nine hundred eighteen.

The Board of Organization shall promulgate a schedule of statutes and rules hereby repealed.

This section presents the nexus between this constitutional article and the change in practice and the regulation of business, more summarily discussed in the closing part of this report, namely, the Short Practice Act and the Rules of Court.

It is of course assumed that when it is provided that the Board of Organization shall promulgate a schedule of statutes and rules hereby repealed that that carries with it the force of employes and the expenses necessary for the expeditious promulgation of such necessary schedules and this is involved definitely in the next section, Section 16.

Section 16.—Expenses of organization.—The legislature shall provide for all the expenses incident to the organization of the Court of the State of New York and to making effective the provisions of this article.

This section requires no argument in support of its reasonableness.

Since Part I of our report was written, we have received by courtesy of the American Judicature Society the report of the committee of the Mississippi State Bar Association, which has been at work for several years on a plan for unifying the judicial system of that state. It is with great satisfaction that we note the substantial similarity of our conclusions, due, doubtless, to the fact that we both started from the plan of the American Judicature Society as a primary suggestion.

It is well to note the substantial points of difference in the conclusions reached in this Mississippi draft.

A

In the first place, the judicial power of their state is to be vested in one general court consisting of three permanent divisions: (1) the Court of Appeals; (2) the Circuit Court; and (3) the District Court. The District Court is given full original jurisdiction over matters heretofore cognizable before the justices of the peace, and all matters at law or in equity where the amount involved does

not exceed $500 in value, and over certain misdemeanors, and any civil case where the parties so stipulate, regardless of the amount involved, but the jurisdictional amounts limiting the matters before this division may be varied by the Judicial Council, which corresponds to the Board of Assignment and Control. The term "Judicial Council" appears in many ways more felicitous, if not as definitive as the longer term to which we have committed ourselves.

The second division is called the Circuit Court, and is subdivided into a Chancery Division and a Law Division.

The first division is styled the Court of Appeals.

B

We commend the scheme for the organization of the Court of Appeals into divisions and note that the plan is not materially diverse from our own, and we note Section 3 of Art. VI, which provides that no case shall be adjudged in that court until the record or briefs have been fully read, or heard read *by at least three justices or judges thereof.*

C

The next point of difference is that it contemplates an elective judiciary, those who are members of the Court of Appeals being designated as "chief justice" and "associate justices," and the others of the Circuit and District Courts being called "judges." But there is an interesting requirement that no person shall become a candidate for judge or justice or be appointed thereto until he shall have been examined by the Judicial Council (1) upon his moral fitness, (2) upon his administrative and executive fitness, and (3) *upon his legal learning!*

With such safeguards upon the selection of candidates for judicial office the elective system loses its most objectionable features, but also loses its justification, for if the judicial council over which the chief justice of the general court presides, has this veto power, *it might as well have, through its chief justice, its selective power complete.* And in its discussion of its proposed plan, at page 28 of its report, the Mississippi Committee makes the following argument, which we deem of sufficient informatory interest to quote in full:

The most serious objections to the elective system practically reduce themselves to two, which can be stated thus: (1) That judicial campaigns too fre-

quently degenerate into mere ordinary political or personal scrambles much below the dignity of the judicial office, thereby considerably lowering it in the public regard, with incapable and unfit men in some instances offering and being elected by the means of such methods as such men are the more apt to use, and (2) that local questions and temporary passions, and interested combinations, social, political or commercial, may deter a judge or else humiliate him by defeat. The first of these objections is met by providing that the candidate shall be examined on all the elements of his fitness. While this is not essential at all to the plan, we do suggest it in all seriousness and point to examples of such modern and enlightened principle as are already in use with us in reference to candidates for bank examiners and superintendents of education. If important as to those purely administrative officers, how much more so to those who pass judgment not only upon the property rights of our people, but even upon their very lives and liberties. It will be observed that ample provisions are suggested to secure entire impartiality and justness of decision on these examinations. There could certainly be no objection to the arrangement on the part of any candidate who really possessed, and was conscious of possessing, the suitable qualifications, and who being fit should be, and would be, willing to put the same to a test. In fact only fit men would offer,—the unfit would not appear for an examination. It is further provided that the Judicial Council shall prescribe and enforce general rules and regulations for the conduct of judicial campaigns and for the promotion of the dignity and integrity thereof. These two proposals simply would furnish additional means, by which the courts themselves, through the aid and agency of an authoritative and representative central head could be allowed, and could have the power, to work out their own salvation. The public expects, and rightly expects the courts to be above ordinary politics and political methods, and to exhibit a higher quality of honorable and efficient service, and yet the full means by which they are to attain to the high standard is withheld from them. Lawyers should continually call attention to these things.

The second objection is taken care of as hereinbefore alluded to by the enlarging of the circuits for election to six in the whole state, thereby getting the judges beyond any mere locality or provincial section and any evil punitive powers therein, and yet not making the area so large that the people therein may not have full opportunity to know the men that offer, and the separation of judicial elections wholly from any other precludes such evils as swapping and to a great extent the injection of factional politics therein. As to the district judges the second objection is not eliminated entirely. But the taking away from them of the liquor litigation and the fact that no large questions of general public interest will be before them and no cases of sufficient individual importance as to arouse any combined animosity greatly weakens its force. The people in the small territory of the district courts would know each candidate, his life, character and ability without the necessity of any extended campaign, and the extremely objectionable feature of a judicial candidate making in these small districts a house to house button-holing campaign could be eliminated by the proper regulations prohibitive thereof to be provided by the Judicial Council as aforementioned. And again, the whole matter is still further safeguarded against any egregious error in selection by the provisions for removal in intolerable cases by the Judicial

Council by a five to seven vote thereof, for causes shown. The elective principle possesses certainly one advantage and that is that the people will be unlikely, and it will be unusual, to remove a satisfactory judge, as has been the general experience wherever the plan is in operation. It will give greater permanency and stability in the personnel of the courts. Under the appointive system with us, faithful and efficient judges were removed to give place to political or personal preferences, and the Supreme Court has entirely changed in personnel several times within a period shorter than the term of one judge in some states,—a condition which is extremely objectionable especially in a court of last resort.

There is so much of merit in the appointive system, however, when not excessive power as to the number of appointments is granted to any one man, that undoubtedly a small portion of it ought to be preserved in any highly efficient judicial system. A combination of the elective and appointive systems, the former predominating, would produce results superior to either alone. We have suggested therefore such a combination and to that end, have suggested that the judges of the chancery division of the Circuit Court be appointed by the chief justice, who on account of the large measure of responsibility placed upon him for the workings of the department, and because of his superior means of knowledge of the qualifications of lawyers and judges, should exercise this function. There are many able lawyers whose services on the bench the state would be most fortunate to secure, who would under no conditions offer at an election. There are many whose habits of life and study are such that they possess not a particle of political capacity and who could not be elected. The state ought not to be cut off from the chance to secure the services of some few such men. These are usually just the character of lawyer who would most admirably meet the demands of the laborious service of the chancery division. That court is such, that few of the people attend it or have an opportunity to observe or know the judge. It is by no means a people's court, while on the other hand the judges of the law division of the Circuit Courts and of the District Courts with the attendance of juries and numerous witnesses before them, would be to a large measure at all times under close, general, public observation.

This combination of the elective and appointive plans would tend furthermore and greatly to get better results both in the elections and in the appointments. The people would no doubt take that pride and thought and care on the subject that the men elected by them should not be inferior generally to those appointed, and the appointing power would most certainly be extremely diligent and careful that his appointees should not rank in ability and character below those elected, each knowing that if in the end one continued to fall behind the other it would have to go by the board and the power be surrendered.

Some further of the appointive system has been suggested to be preserved in the filling of all vacancies by appointment by the Chief Justice by promotion. This is for the purpose (1) of avoiding special elections of which the people have had, and are having too many, and of which they are becoming exceedingly tired and are taking little interest, (2) because at such special elections there being generally several candidates there is election by mere plurality, which may be accidental, or even unfortunate, (3) for the inducement that such chance of promotion would present to good material to offer for circuit and district judges,

particularly the latter; (4) because it is better to promote an experienced judge than to select an entirely new man; and (5) to further relieve these appointments to some extent from our previous curse of mere politics in such matters.

D

We note also the amplification of the powers of the general court vested in this Judicial Council and the powers of such Council to make, alter, amend and promulgate all rules regulating the pleading, practice and procedure in all the courts. There is a provision that the legislature may repeal any such rule in whole or in part, provided it has been given two years' trial in operation.

E

We note further the short term idea for the Chief Justice of four years.

We note further that removal is to be by impeachment or a two-thirds vote of each branch of the legislature, except as to the judges of the second and third divisions who may be at any time removed "by at least a five to seven vote of the Judicial Council for (a) inefficiency, or (b) incompetency, or (c) neglect of duty or (d) conduct unbecoming a judge."

There is also provision for justices of the peace and permission to the legislature to establish municipal criminal courts and quasi-judicial tribunals. Any reader of our report who desires to examine the reasons proffered by the Mississippi Bar Association, whose address unfortunately is not appended to the report, can doubtless secure a copy of such report from the printers, Hederman Brothers, Jackson, Miss., or Herbert Harley, Secretary of the American Judicature Society, 31 West Lake Street, Chicago, Ill.

F

We notice that in providing for the division for the trial of causes not exceeding $500 in amount, the Mississippi Bar Association has commented as follows upon the English system which we have so strenuously advocated, in respect of the scheme of masters:

One of the reasons why the trial courts in England have been able to handle, with a few judges, such an enormous number of cases per year, is because all non-contested cases are disposed of and all preliminary matters of pleadings, etc., are heard and made ready, by registrars, referees, masters, etc., who are *learned in the law.*

And it is to be noted that this division of courts of small jurisdiction, called "District Court," in the Mississippi plan, corresponds to the County Court scheme in England. In the debates that preceded the New York Constitutional Convention in 1915, it was urged with considerable force, and with the most sincere conviction in the upper part of the state, that the people would not consent to the abolition of the Surrogates' and County courts for the reason that they were locally accessible; that even though the judges presiding over these courts were not always men of supreme court calibre, yet they were of the vicinage, they were the confidants of the community and that if they committed errors of law, their acts were readily reviewable. The trouble with this criticism was that it assumed that, if the courts were taken up into a general court, the present scheme of differentiating between the Supreme Court with its terms and judges, and the County and Surrogates' courts with their terms and judges, would come to an end, and the people would be remitted to terms and sessions of a court not corresponding to that with which they were familiar. This begs the whole question and is far from being the purpose of the unification of the courts. For, if the Surrogates' Court of a particular county is taken up by this amendment into the Court of the State, nevertheless, the Surrogate or County Judge presiding, is also taken up into the judicial system, which contemplates a divisionalization of the jurisdiction of that court and an immediate and continuous assignment of that particular functionary to the same duties he has been discharging with the most important modification and development that in any matter coming before him for cognizance, he can exercise at law or in equity the plenary powers of the unified court into which his court has been taken up and assimilated.

G

In connection with our discussion of one or more appeals, it is interesting to note the general purpose of the Mississippi plan "to eliminate more than one trial in the court below and the delay and expense of two trials, where the lower court is presided over by a judge *learned in the law*," that is to say, that appeals are duplicated only where taken up from a quasi-judicial tribunal or a justice of the peace, or district judge. Consequently from any divisional part of the unified court other than these, the appeal is direct to the

division of final appeal. Your committee has no quarrel with this device.

H

With regard to the method of selection of judges, we note that the Mississippi plan contemplates that with the exception of the chief justice, who is to be elected from the state at large, the associate judges and justices are to be elected territorially from within the various circuits and contiguous territories which are to be created by the Judicial Council, but we note this extract from the report with regard to the question of candidacy for judicial office:

> The size of the present Supreme Court districts, each covering one-third of the state deter all but a few from indulging in any active ambition towards the Supreme bench. Lawyers do not now practice over many counties as in years past. An able lawyer in one county may be almost unknown to the people at large in a distant part of one of our present Supreme Court districts. *To make now such a canvass as is necessary to become generally acquainted means the abandonment for months of their practice which few can either afford or will risk.*

Then, after discussing the question of the territorial arrangement of the circuits for the more important judicial offices, this proposition is set forth, which bears, we think, adversely on the question of the propriety of election to judicial office:

> It can well be apprehended that there is more than one circuit in the state at present where certain influences, or certain combinations, especially in those containing a large town or city, may hold the balance of the voting power, and put a judge in fear unless he do or omit to do as it shall be brought to his understanding that he is expected. This is obvious and need not be dwelt upon. *So being it must be safeguarded everywhere possible.*

PART TWO—SUGGESTIONS FOR A SHORT PRACTICE ACT

From the foregoing suggestions with regard to matters of sufficient permanent importance to be set forth in a Constitutional Judiciary Article, we pass to the second stage of this report, *i.e.*, what matters of procedure may properly be left to the control of the legislature as representing the people rather than committed to the courts for their regulation and development from time to time, that is to say, what ought a Short Practice Act to contain in contradistinction to rules of court.

From one point of view this is the most difficult task before the bar. It may be that the American Judicature Society has so con-

sidered it, because, having framed a general Judicature Act and being now engaged in formulating rules of general applicability, it proposes as the last stage of its service to the profession and to the community, to propose a model Short Practice Act. This committee has had the advantage of considerable material, but the wealth of it available has merely proved the magnitude of the task.

The English Judicature Acts, beginning with the Supreme Court Judicature Act of 1873, 36 and 37 Vict. ch. 66, marked a most interesting step in the evolution of the simplification of practice by the unification of courts. It consolidated into the Supreme Court of Judicature in England the High Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas, the Westminster, the Court of Exchequer, the Court for Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy, and divided the new court into two "permanent divisions," one under the name of "Her Majesty's High Court of Justice," which, it was provided, "shall have and exercise original jurisdiction, with such appellate jurisdiction from inferior courts as is hereinafter mentioned," the other, "Her Majesty's Court of Appeal," which was "to have and exercise appellate jurisdiction with such original jurisdiction as hereinafter mentioned as may be incident to the determination of any appeal."

A member of the New Jersey bar[17] rendered a considerable service to that state by contrasting the courts and procedure in England and those in New Jersey with a view to the enactment of the Short Practice Act of New Jersey. The Connecticut Short Practice Act is probably as concise as any in operation. There has also been promulgated in the state of Illinois, "An Act in Relation to Practice and Procedure in Courts of Record."

The Rodenbeck Commission in New York in its report hereinbefore referred to,[18] drafted a Civil Practice Act of seventy-one sections, which has been subjected to very careful and, in the main, sympathetic examination and criticism—in particular, by a committee of the New York State Bar Association in 1916. With the following preliminary statement we are in hearty accord:

"The present code system in this state of regulating details of

[17] Hartshorne, *Courts and Procedure, England and New Jersey*, published by Soney & Sage, Newark, New Jersey, 1905.

[18] Vol. I, 1915.

practice by statute has been tried and has so lamentably failed and has been condemned in such unmeasured terms that it may be passed by without further comment."[19]

The most helpful, interesting and valuable examination and criticism was made by a subcommittee of the "Committee on Practice and Procedure in the Supreme Court" of the New York County Lawyers' Association, of which Mr. Max D. Steuer was chairman, which drafted a Short Practice Act of fifty-six sections. Your committee deems this draft of sufficient importance to annex it as an exhibit to this report, marked "A." For the purpose of this discussion, however, and to support our contention that any such act must be less specific, we venture to call attention to Sections 20 to 29 inclusive, which relate generally to examinations of parties and inspections of documents before trial within or without the state, and contain nearly 1,400 words.

Each of these sections is in itself concise and specific and presents a particular phrase of the subject-matter covered, but in our judgment it is too voluminous and too specific. Having the force and operation of a statute the mere fact that it is provided elsewhere in the same statute that it shall be "liberally construed" will not alter the fact that, as with similar provisions in the past, procedural statutes are usually construed into refinements, elaborated into particulars that have led the legislature to enter upon a career of amendments and supplements that soon swell the original compact statute into an unwieldy code. We have selected, accordingly, these particular sections for the purpose of illustrating our primary contention that in a statute as well as in a constitutional provision the treatment should be generic and not specific. We start, therefore, with the premise that in our proposed constitutional article there has been provision made for the appointment of Masters or Supreme Court Commissioners before whom the preliminary, interlocutory or supplementary procedural motions shall be brought on by summons for direction and disposed of by "omnibus order" under such general rules as the Court of the State may promulgate.

If such provision be made in the Constitution and such rules

[19] Report of the Board of Statutory Consolidation of the state of New York, on a Plan for the Simplification of the Civil Practice in the courts in this state (1912).

be promulgated, then these sections of a Short Practice Act need not be so elaborate or specific and in the Master's office all the details of the necessary orders to be entered can be all disposed of under the "omnibus order" and on the return of the summons for direction. If this be possible, then, so far as the short practice act is concerned, its provisions could be embraced within one broad, comprehensive section, reading perhaps as follows:

EXAMINATION BEFORE TRIAL, AND DISCOVERY

1. Upon such notice and terms as the Court by its rules may from time to time prescribe a party may before trial and within or without the state, take, before a Master or an officer authorized to administer oaths, the testimony of another party or of any witness, on oral or written interrogations and upon reasonable notice to all other parties to the action to whom the opportunity of cross examination is hereby reserved. Upon any such examination any material papers, books or records, may be required by any party to be produced by any other party and examined and copied in whole or in part.

Provided that upon the trial of the action the Court may exclude such testimony or copies or parts thereof as may not be necessary for fairly disposing of the cause, and may impose costs upon any party found by it to have proceeded for such examination or discovery in a vexatious, dilatory or unreasonable manner.

2. *Inspection and identification of documents.* Upon such notice and terms as the Court by its rules may from time to time prescribe, upon application of any party before trial the Court, or a Master thereof, may by order require any document or books referred to in any pleading or affidavit in the cause to be produced for inspection or a sworn copy thereof furnished; and the Court or such Master may deal with such documents, books or sworn copies in such manner as shall promote the fair disposition of the cause at the trial thereof.[20]

The object of these applications is assumed to be twofold: (a) Theoretically, the more the facts are known to the parties on both sides before actual trial the greater likelihood there is of a settlement of the controversy without troubling the court by a trial. (b) But if not settled, then everything essential to the "fair disposition" of the cause is certainly made available to the trial court. There is less likelihood of "surprise," and fair-minded counsel having inspected letters, alleged releases, accounts, mutual or stated, or admissions in documents or books of account, can more faithfully advise their clients and save the time of the courts and the public moneys.

The object of being general rather than specific in such sections

[20] Cf. §§ 20–29, *post*, of Exhibit A.

of a Short Practice Act is that the court by its rules may deal with details and conform them to the curing of abuses that develop from time to time. Punitive costs, perhaps imposable on the attorney jointly with the client, will operate as strong deterrents to abuses.

It must of course be conceded that conciseness is not always consistent with comprehensiveness, nor is it necessarily synonymous with clarity. The point, of course, for statute-makers is primarily: what do you wish to accomplish? And in respect to certain statutes it is more important to make your meaning clear than compact. But, if we once concede the propriety of a court's making procedural rules, then we must concede the impropriety of carrying too much detail into a Short Practice Act. Such an act alone is not a cure-all. A friend recently told the writer that even in Connecticut it took five months after the first pleading was served before the issue was finally joined and ready to be tried by the court. It is of itself alone no guaranty, therefore, against the law's delay.[21] A lawyer determined to gain time for his client it appears can do so even under a Short Practice Act. We respectfully submit that under the operation of the scheme of Masters no such delay could be secured, if the Master were alert, conscientious and keenly aware of the dignity and importance of his office. But we are satisfied that the Short Practice Act recommended by the subcommittee of the New York County Lawyers' Association is an improvement upon prior models, so far as the state of New York is concerned, but we urge that a sympathetic and intelligent blue pencil could accomplish in several other of the sections a satisfactory condensation in volume.

The inquiry must be when the legislature comes to deal with the enactment of a Short Practice Act, "To what extent shall the people through their representatives in the legislature let go of their control of the administration of justice?" The unfortunate feature of this inquiry is exactly the same as was pointed out by Mr. Rufus Choate in discussing the question of an appointive judiciary. The rights of the people to control are not to be divested. The people are simply committing to trained and intelligent agents, to wit: the judiciary of the state, the doing of this specific task of regulating procedure. The people are vesting in public service

[21] See article published herewith, by Mr. Martin Conboy, of the New Jersey and New York bars, on the operation of the New Jersey Act.

commissions and workmen's compensation boards and in other boards and agencies, their various powers of regulation—some powers quasi-judicial, some in aid of the executive, some purely administrative—but all of them powers intended to be intrusted to efficient instrumentality and for the purpose of having the *people's work efficiently done.* It is on precisely the same theory that we contend that the judiciary with the assistance of the bar is more competent to devise and to administer, and to keep up to date, methods of judicial administration.

We plead, therefore, for a minimum of legislative regulation through a Short Practice Act. We plead for a minimum of specific sections in such an act. We urge that it will be unfortunate if into such an act is written more than the skeleton of practice, its mere essential bones—for the moment that the act deals with anything that might be described as the muscles or the arteries or the veins of the procedural body, then there will grow up litigation, urging that the legislature intended by the inclusion of a provision in this particular respect in the *act* to divest the court of the power of regulating it by its *rules.* Our recommendation in respect to this matter of a Short Practice Act generally, with particular reference to the state of New York, is that the legislature on the advice of the bar associations of the state which have already given more than customary attention to this very subject, should enact a Short Practice Act and that thereupon the New York associations of the bar should await the uniform Short Practice Act to be promulgated by the American Judicature Society and then should coöperate with the Committee of the American Bar Association on uniform state laws and in the conferences of that association with other bar associations should endeavor to secure throughout the United States the enactment of a Uniform Practice Act.

Theoretically, there is no reason or justification for a differentiation in practice between the state and federal courts, or between the courts of New York and the courts of New Jersey, or the courts of Massachusetts and the courts of California. The ingenuity of the bar and a general national spirit could even reconcile the difficulties inherent in adjusting the practice of Louisiana to that of Ohio. The bar of the country cannot render a greater service to the nation than by enlisting heartily and sympathetically in a movement for a uniform practice in all the courts of the land.

This will do more than any other single influence to create a nationalization of the people of the various states and without the loss of a single substantial right.

It may be that the citizens of various localities are entitled to certain rights and remedies as against aliens, but if local litigants are protected by adequate provisions for security for costs against long-distance opponents, there is no reason why American citizens dealing with one another in their business interests throughout the land should not find uniform and homogeneous tribunals of justice open to the adjustment of their disputes in every state of the Union. As it is (to take but one illustration), a man may have practiced before the Court of Appeals of the state of New York for forty years and may never have had occasion to go to the Supreme Court of the United States in a federal case. And he may be as ignorant as the merest law student of how to secure a writ of error and how to print and prepare his papers. It is this very differentiation which makes it important and necessary for the protection of litigants that although a lawyer may have been a member of the Pennsylvania bar for thirty years, he cannot now be admitted to the bar of the state of New York except upon conditions insuring his familiarity with the New York practice extending over a specified term of years. This is, of course, irrespective of the courtesy extended by local courts of hearing counsel admitted on a motion *ad rem.*

We offer two illustrations to show the unwisdom of having procedural matters controlled by legislative enactment:

ILLUSTRATION No. 1

In 1896, Section 803 of the New York Code of Civil Procedure read as follows:

> Sec. 803. *The court may direct discovery of books, etc.* A court of record, other than a justices' court in a city, has power to compel a party to an action pending therein, to produce and discover, or to give to the other party, an inspection and copy, or permission to take a copy of a book, document, or other paper, in his possession or under his control, relating to the merits of the action, or of the defense therein.[22]

In 1896, and down to the present time, Section 804 of the Code of Civil Procedure read as follows:

[22] 2 R. S. 199, Section 21, consolidated with Co. Proc., section 388.

Sec. 804. *Rules to prescribe the cases, etc.* The general rules of practice must prescribe the cases in which a discovery or inspection may be so compelled, and the proceedings for that purpose, where the same are not prescribed in this act.[23]

In 1896, Subdivision 3 of Rule XIV of the General Rules of Practice was amended to read as follows:

3. Either party may be compelled to make a discovery of any book, document, record, article or property in his possession or under his control, or in the possession of his agent or attorney, upon its appearing to the satisfaction of the court that such book, document, record, article or property is material to the decision of the action or special proceeding, or some motion or application therein, or is competent evidence in the case, or an inspection thereof is necessary to enable a party to prepare for trial.[24]

As early as the year 1901, in the case of *Auerbach* v. *Delaware L. & W. R. R. Co.*, 66 A. D. 201 (Fourth Department), it was held that in enlarging the scope of this rule so as to include property other than that specifically mentioned in Section 803 of the Code, the Convention of Judges, held in 1895, exceeded its authority, and the appellate division reversed an order granting plaintiff's motion for a discovery and inspection of parts of a locomotive boiler, through defects in which he claimed to have been injured.

The rule of the Auerbach case was followed in the case of *Pina Maya-Sisal Co.* v. *Squire Mfg. Co.*, 55 Misc. 325 (Supreme Court, Erie County, 1907).

But it was not until the year 1909 (Chapter 173 of the Session Laws of that year) that Section 803 of the Code was amended so as to read: "book, document or other paper, *or to make discovery of any article or property.*"

By Chapter 86 of the Laws of 1913, Section 803 was again amended so as to read: "Permission to take a copy *or photograph* of a book, document or other paper."

The legislators doubtless feared that the right conferred upon the Convention of Justices, to provide in the General Rules of Practice for the taking of a *copy* of a book, was not broad enough to authorize them to provide for the taking of a *photograph! It took eight years to secure the legislative modification.*

[23] *Id.*, Section 22, amendment. See rules 14–16.

[24] Formerly rule 14, 1858; rule 18, 1871; rule 18, 1874; rule 14, 1877; rule 14, 1880; rule 14, 1884; rule 14, 1888; rule 14, 1896.

ILLUSTRATION NO. 2

On June 1, 1906, the justices of the City Court of the City of New York, in convention assembled, passed a rule ordering the clerk to make up a new calendar of trial issues for October, 1906. The rule further provided that no action then regularly on the calendar should be placed upon the new calendar unless a new note of issue, for which no fee was to be charged, should be filed with the clerk between certain dates.

In the case of *Willer* v. *Mink Restaurant Co.*, 60 Misc. 358 (City Court Special Term 1908), it was held that the City Court of the City of New York had no power to make such rule as it was in contravention of Section 977 of the Code of Civil Procedure, which then provided and still provides that:

> . . . . in the County of New York . . . . where a party has served a notice of trial, and filed a note of issue, for a term at which the case is not tried, it is not necessary for him to serve a new notice of trial, or file a new note of issue, for a succeeding term; and the action must remain on the calendar until it is dispensed of.

The Mink case followed the rule of the appellate term laid down in the case of *Rauchberger* v. *Interurban St. R. Co.*, 52 Misc. 518, in which the same rule was under consideration, and in which the same conclusion is reached.

Here we have the ridiculous situation of a court being unable to clear its calendar of dead wood, because its rule technically contravenes a section of the Code of Civil Procedure, which certainly had not been intended to achieve any such result.

To what extent will the relegation to the courts of this power of procedural regulation remedy these conditions? This brings us to Part Three of our report.

PART THREE—RULES OF COURT

We come now to the discussion of Rules of Court, with two general propositions assumed to be accepted:

(a) That a Judiciary Article has been written into the Constitution of the particular state, unifying the courts, and giving the unified court power to make its rules and discipline the members of the bench and bar, and that such court is constituted with an administrative body within its membership calculated to an effi-

cient disposition of court business, and that procedural details will be eliminated from the court's consideration by the creation of Masters, and that elaborate codes of procedure have been abolished.

(b) We assume that in the transition stage of such reform a Practice Act is necessary, but that it must be concise instead of diffuse, and that it must be generic rather than specific.

This brings us to:

(c) That there should be a free hand given to the courts to regulate the conduct of causes on trial or on appeal, elastic, readily amendable, including rules of evidence (if the legislature does not act in specific instances), and upon the formulation and setting in operation of such rules, that it becomes a cardinal principle that technical violation of the rules may be in proper cases disregarded by the trial court, and, unless substantial rights are thereby affected, shall be disregarded on appeal.

Under this discussion of rules we collate for the information of the Club certain authoritative statements from the various discussions of this subject in recent years:

1

It is no longer necessary to rely solely upon *a priori* argument in support of the plan to commit control of procedure to rules of court. This mode of dealing with procedural problems now has behind it wide and long-continued experience, at home and abroad.

(1) It has been in force in England since 1875, and now obtains also in Ireland, Canada, Australia and India.

(2) It has been in force with respect to practice in equity in the federal courts since 1842.

(3) It has been in force in the admiralty jurisdiction of the federal courts since 1842.

(4) The Supreme Court of the United States has had and exercised the power to regulate the details of procedure in bankruptcy by rules since 1898.

(5) The same court was given power to regulate practice in copyright causes by rules in the Copyright Act of 1909.

(6) The federal commerce court had and exercised the same power.

(7) It has been in force in New Jersey since 1912.

(8) It is now in force in Colorado.

(9) It has been in force within fairly wide limits in the Municipal Court of Chicago for seven years.

(10) It is also in force, within certain limits, in the Municipal Court of Cleveland.

(11) It has been in force for some time in modern administrative tribunals,

such as public service commissions, industrial commissions and the new Federal Trade Commission.[25]

To this may now be added the rules promulgated, and thus still under advisement, by the Supreme Court of the United States.

2

The power to regulate practice and procedure is properly a judicial power, and the rules should be subject to promulgation and change as the exigencies of the administration of justice may require. *Before the adoption of statutory codes of civil procedure the recognized method of regulating practice was through general rules of Court.* Since the adoption of codes, however, the courts, though probably still competent to exercise their judicial prerogative, have in general acquiesced in, if they have not felt themselves controlled by, the legislative procedural enactments.[26]

3

What is needed in a practical matter of this sort is the possibility of *making changes when they are needed,* to have the new rule made by the people who have to apply and interpret it, to have it made with reference to concrete cases, and to have pleading and practice develop from experience, just exactly as three-quarters of our ordinary substantive law does. If we had the flexibility and power of growth in procedure that we have in our substantive law, I venture to say we should have had very little difficulty with practice in this country.[27]

4

RULES OF PROCEDURE SHOULD BE LEFT TO THE COURTS

Again, as already foreshadowed above, the chief value of the reform proposed is that it substitutes for the inelastic legislative code now in operation, a project for rules, elastic and adaptable by the courts to changing conditions. If the reason for a change is valid in any degree, then the *reform should be given its full opportunity of operation, committing the entire matter of the formulation of the rules to the court at the outset.*[28]

5

The rules of court are subject to being abandoned as well as adopted at the will of the court. If a rule is not a good one, it is abandoned; we can get rid

[25] Extract from article entitled "Regulation of Judicial Procedure by Rules of Court" by Professor Roscoe Pound, 10 *Illinois Law Review* 163 (October, 1915).

[26] Extract from Report of special section of the California Bar Association, appointed to investigate and report upon the advisability of having matters of procedure and practice governed by rules of court rather than by legislative enactment, submitted to the California Bar Association in July, 1916.

[27] Extract from address of Professor Roscoe Pound delivered before the Ohio State Bar Association in 1915.

[28] Extract from Memorandum on the Report of the Board of Statutory Consolidation on the Simplification of Civil Procedure in the state of New York, submitted by the Lawyers' Group for the Study of Professional Problems.

of it just as quick as we got it. All we have to do is to call a meeting and pass a new rule or abolish the old one.

We work in connection with the bar association in drafting rules. Any lawyer in Chicago is entirely at liberty to come, and we are glad to have him come in and ask for an improvement in the administration of justice. If any lawyer in that city can suggest an improved rule, the judges take the matter up with the committee of the bar association, and finally the whole court considers it, and if it seems to the judges to be a good rule, it will be adopted and put into force at once. *We don't go to the legislature, and wait from two or four or six years to get something done.* You know, in this day of specialized business, with efficiency everywhere, we haven't the time to do that. We have to reform our courts and put into them the same aggressive spirit as we do into our other organizations.[29]

6

Furthermore, the existence of this great variety of minute, detailed statutory provisions has been breeding a great number of code lawyers, and by that I mean lawyers whose principal concern is with the statutory code of rules and not with getting justice for their clients.[30]

7

So far as the object of rules is to provide for orderly dispatch of business, with consequent saving of public time and maintenance of the dignity of tribunals, we ought to leave it to the tribunals, not to the parties, to vindicate them; and decisions with respect to such rules should be reviewed only for abuse of discretion. This principle is recognized to some extent in practice, as it stands. The order in which testimony shall be adduced, whether a party who has rested shall be permitted to withdraw his rest and introduce further testimony, the order of argument, in most jurisdictions the time to be devoted to argument, and many other matters of the sort are left to the discretion of the trial judge. The reason is that such rules as exist upon these points exist in the interest of the court and of public time, and not in the interest of the parties. But there are other rules resting upon the same basis, which, unhappily, are not dealt with in the same way. This is notably true in the law of evidence. Many rules of evidence are in the interest of expedition and saving of time, rather than of protecting any party; prejudice to the dispatch of judicial business is the objection rather than prejudice to a party. In all such cases how far the rule should be enforced in any cause should be a matter for the discretion of the court in view of the circumstances of that cause. Some courts, indeed, recognize this. But for the most part it has been assumed that there must be an absolute rule or no rule in these cases also as if substantive rights depended upon them.[31]

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[29] Extracts from address by Chief Justice Olson, delivered in San Francisco in May, 1916, concerning the work of the Chicago Municipal Court.

[30] *New York World*, August 20, 1915. Remarks of Hon. Elihu Root in a speech before the Constitutional Convention of New York.

[31] Extract from article entitled "Some Principles of Procedural Reform" by Professor Roscoe Pound, 4 *Illinois Law Journal* 388 (January, 1910).

8

(1) No one can anticipate in advance the exact workings of a detailed rule of practice. Change and adaptation to the exigencies of judicial administration are inevitable. The judges are best qualified to determine what experience requires and how the rule is actually working.

(2) The opinion of the bar as to the working of a rule may be made known to and made to affect the action of the judges in framing new rules or improving old ones much more easily and with better results than where the legislature must be applied to.

(3) Small details do not interest the legislature, and it is almost impossible to correct them.

(4) Too often details in which some one member of the legislature has a personal interest are dealt with by legislation, and not always in accord with the real advantages of procedure.

(5) As experience shows that changes are needed and what they are, there ought to be a possibility of speedy adjustment of details of procedure. Only rules of court can meet this demand.[32]

This presents a most authoritative consensus of opinion in favor of this topic of our report.

There is a cautionary word, however, to be said. It is not unlikely that the preparation of the rules will always be affected by local, or, rather, personal, considerations. There is danger that it may be affected by the bias, due to education or professional experience, of the individuals engaged in drafting them. This is peculiarly illustrated in the discussion in the following two extracts by one of the most helpful contributors to the discussion of this subject, Professor Roscoe Pound.

In discussing the "Field Code" of 1848, Professor Pound remarks:

9

Field was not an equity lawyer and, thinking only of the legal situation, drafted some important sections in such a way as seriously to embarrass proceedings in equity. This was true particularly of the provisions as to joinder and as to cross demands, which took no account of the equitable doctrine of complete disposition of the cause and the practice of joining all persons interested in the subject of a suit in equity and proper to complete relief. Speaking of one of the provisions as to joinder, the Court of Appeals said in a wellknown case:[33]

"This provision, as it now stands, was introduced in the Amendment of 1852

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[32] Summary of advantages made by Professor Roscoe Pound and used by him in many articles and papers, among other places, in the article in the No. 4 *Illinois Law Review*, 388 entitled "Some Principles of Procedural Reform."

[33] *New York, & N. H. R. Co.* v. *Schuyler*, 17 N. Y. 592, 604.

because the successive codes of 1848, 1849, and 1851 . . . . had in effect abrogated equity jurisdiction in many important cases, by failing to provide for a union of subjects and parties in one suit, indispensable to its exercise."

Under a system of regulating procedure by statutory enactment of details, the judges were powerless in such a case. They could do no more than interpret and apply; they could not alter the rules, which, unintended by their author, operated in the daily work of the courts to defeat the substantive rights of parties in complicated causes. Only the legislature could apply the remedy to this condition. But the legislative amendment itself was in like manner rigid and unalterable. When it came, it did no more than mitigate the difficulty, since those who drew it had, as we are told, at best only "some remote knowledge" of the equity practice. In consequence the amendment and legislation founded upon it in other states has been a source of difficulty and a breeder of litigation for two generations.

A like mistake was made in the first rules under the Judicature Act in England. Those rules were drawn by men familiar with the practice in equity, with too exclusive attention to the exigencies of equity procedure, and in consequence proved a source of delay, expense and embarrassment in some classes of actions at law. But under the system provided by the Judicature Act the necessary changes came naturally and gradually. *It was not necessary to go to Parliament for new legislation to remedy each defect as it developed.* As experience showed what the difficulties were and how they might be met, the judges themselves were able to and did change the rules until, partly by revision as a whole at various times and partly by amendment of individual rules, they came into their present form. Thus at a time when the reformed procedure in America was struggling beneath an accumulated load of interpretation, amendment and controversy, which largely impaired its usefulness, the reformed procedure in England was undergoing a relatively rapid process of simplification and improvement.

An example of the manner in which power to regulate procedure by rules of court enables speedy correction of defects revealed in the course of judicial experience may be seen in the English Rules of the Supreme Court, Order 65, Rule 6A. As the practice stood prior to December, 1885, where a non-resident plaintiff was temporarily in England, security for costs could not be required of him. In December, 1884, a case was before the Court of Appeal in which the court was compelled to enforce the then practice. But it did so reluctantly and two lords justices pronounced the rule unjust. No application to Parliament for a legislative change of the law was required. In 1885 the judges adopted a new rule (Order 65, Rule 6A) providing that "a plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction." One needs only to reflect how slowly such a change would come about in an American code of civil procedure to perceive the expediency of judicial rather than legislative formulation of procedural rules.[34]

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[34] Extract from article entitled "Regulation of Judicial Procedure by Rules of Court," by Professor Roscoe Pound, 10 *Illinois Law Review* 163 (October, 1915).

Again, after referring to the Field Code and how it grew from 391 to over 3,000 sections, Dr. Pound continued:

> Compare with this the method employed in the English Judicature Act. That act contained about 100 section, with a schedule of 58 rules of practice appended, leaving details to rules of court to be framed by the judges. In drawing up the first rules a mistake was made analogous to that made by the framers of the New York Code. The latter had their eyes chiefly on practice at law and in consequence made rules at many points which proved awkward of application to equity proceedings. Those who drew the Judicature Act and the first rules thereunder were equity lawyers, had their eyes too much on equity, and hence at first proceedings at law were made cumbersome and dilatory. An amusing exposition of the workings of the older rules may be seen in Judge Harris's book, *Farmer Bumpkin's Lawsuit.* But legislation was not necessary to effect a change. The judges themselves were able to and did change the rules as experience of actual application dictated, until the present rules were developed. How unfortunate the results of hard and fast legislation as to the details of procedure may prove in practice, is demonstrated by later English legislation with respect to workmen's compensation. Instead of leaving the details of procedure in such cases to general rules to be framed by those who were to administer them, Parliament enacted where appeals should go and in what manner, in such a way that in the reports styled *Workmen's Compensation Cases*, we meet frequent examples of appeals dismissed because taken to a Divisional Court instead of to the Court of Appeal or *vice versa*—about the only vestige of appellate procedure left in England.[35]

This emphasizes the importance, above asserted, of having a provision in the Constitution for authority for the courts to make rules, and some provision in the Constitution or the statute for membership in the Rules Drafting Committee of members of the bar so that between the members of the judiciary and of the bar all shades of practice may be represented and the particular situation properly covered.

A subcommittee of your committee has prepared the following schedule of topics which ought to be covered by the rules of court as distinct from being covered by a short practice act:

ACTIONS AND THEIR COMMENCEMENT

Parties—plaintiff and defendant
Poor person
Domestic and foreign corporations
Guardian *ad litem*—Security

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[35] Extract from article entitled "Some Principles of Procedural Reform," by Professor Roscoe Pound, 4 *Illinois Law Journal* 388 (January, 1910).

- Representative capacity
  - Executor
  - Committee
  - Trustee
- Appearance
- Pleading
  - Complaint
  - Answer
  - Counterclaim
  - Set off
  - Reply
  - Rejoinder
  - Interpleader
- Evidence

The rules of evidence should be broad general rules to be included in the rules of court.

It is the opinion of your committee that rules of evidence should not be placed in the Consolidated Laws nor in a statutory code of evidence. As stated in the report of the Board of Statutory Consolidation dated December 1, 1912: "These rules are largely under the control of the courts and the adoption of a liberal policy in disregarding errors on appeal not affecting substantial rights would discourage much of the technical practice now so common in relation to the admission and exclusion of evidence upon the trial of causes."

The salient features of the code of evidence presented to the legislature in 1889 by Mr. David Dudley Field and Mr. William Rumsey are available as precedents out of which a few broad general rules may be formulated which would be sufficiently elastic in their nature to afford substantial justice.

  - Commissions to take testimony
  - Physical Examination
- Notice of trial
  - Preference
  - Calendar practice and classification
- Trial by Jury
  - Challenges
  - Method of swearing witness
  - Non suit
  - Verdict
  - Disagreement
  - Waiver of jury
- Trial by Referee
  - Reference by consent

In the opinion of your committee where both sides agree upon a referee, the same must be appointed by the court except in matrimonial actions.

Judgment
- By default or confession
- Summary
- After trial or reference—after appeal
- Taxation and retaxation of costs
- Entry of
- Judgment roll
- Lien of
- Stay of
- Setting aside

In the opinion of your committee, the reinstatement of verdict reversed on intermediate appeal, should be provided for by rule.

Appeal
- Notice of
- Security
- Stay on
- Record on and filing

In the opinion of your committee, the original stenographer's minutes only should be before the court obviating the expense of printing the same.

- Notice of argument
- Preference
- Briefs
- Hearing
- Decision
- *Remittitur*

Execution
- Discovery in aid of and proceedings supplementary to execution

In the opinion of your committee, arrest and body execution should be limited to wages.

General provisions
- Forms of process, summons, subpoena
  - pleadings
  - affidavit
  - order
  - notice of claim
  - *lis pendens*

Papers
- Service and filing

Summons and motion for directions
- Amendment
- Pleading new cause of action by amendment, on terms

Consolidation and severance
Extension
Stay
Want of prosecution
Default
Argument
Payment into court and out of court
Gross sum, in lieu of annual interest
Regulations for court deposits held by banking institutions
Detention, inspection, preservation and survey of property
Arbitration of controversy
Judgment creditors' actions

PART FOUR—CONCLUSION

The generic purpose of the Phi Delta Phi Club, consisting as it does of graduates in New York and vicinity of the legal fraternity of Phi Delta Phi in the law schools of the country, *is to promote the acceptance and the realization of high ethical ideals.* In reports to the New York State Bar Association and to the American Bar Association at their meetings in 1917, the Committees on Professional Ethics emphasize the fact that the mere adoption of canons of professional ethics was a mere *brutum fulmen*, unless the profession is to carry the spirit of such canons into each professional relationship; that is to say, there must be an *applied* ethic; and the lawyer in his relation to the community must be a student of what Professor Ormond of Princeton used to characterize as the "*metaphysics of oughtness.*" He must be sensitive as a barometer to the evolutionary movements in the community life around him. He must never permit any idea of his personal convenience or profit to influence him in obstructing requisite reforms. Because he may have learned to practice under one scheme of procedure he must not be unwilling to adjust himself to the demands of the new generation for a more expeditious and efficient judicial administration. The days of the retainer and refresher may come again, and the contingent fee and the negligence specialist may largely disappear, but it is clearly to the interest of the legal profession in the last analysis to minimize the time between the summons and the judgment; between the assertion of the claim and the collection of the award. Modern conditions call for speeding up the machine and modern professional ethics make it, in the language of Hoffman's Tenth Resolution, "essential that should clients be disposed to insist upon captious

requisitions or frivolous or vexatious defenses, they shall neither be enforced nor countenanced" by the high-minded practitioner.

Professor Ormond, above mentioned, Princeton '79, and later a valued Professor of Philosophy in that institution, was summarizing in 1885 the philosophy of Herbert Spencer to a junior class and he said, "It is an attempt to weld together a sensational psychology and a transcendental ontology and to subsume it all under the concept of evolution."

It will not be a violent effort for the intelligent reader to apply this characterization to the relationship of the profession of the law to procedural reform.

If, as we said at the outset of this report, the administration of justice is the highest concern of man on earth, Burke was right, when he uttered that phrase, in assuming the transcendental nature of the professional career, at the bar or on the bench.

But it is obvious that while the task of accomplishing this great scheme of simplification is the primary duty of the lawyers of the land, it is equally obvious that numerically there will be a majority of the bar of any given period in opposition to that just ideal, and it is therefore the duty of those who are pledged to the ideal to gain support if possible from the general public in order to the accomplishment of the fundamental and structural changes in the Constitution and statutes of any state that are required to effectuate that ideal.

The word "ideal" is used with regard to reform subjects in two senses. By the "reformer" [a hackneyed term and with a content almost of reproach] it is used to designate the ultimate, desired goal in the evolution of some social condition. By the practical man who has not been able to study the matter in all its phases and connections the word "ideal" is used to indicate the impossible, the unachievable; and the reason why reforms progress so slowly is that the average legislator and the average voter look upon the "reformer" as a man without practical ideals and upon his ideals as Utopian and unworkable. It took a generation to fasten a code of civil procedure on the practice in the state of New York. It has taken another to realize the cruel grip it has on the welfare of the community. It may take another to fully cure the evils which it has wrought.

Your committee has had in mind, therefore, the fact that a constitutional change depends for its accomplishment upon the vote

of the general electorate of the state, and it realizes that the general electorate of the state does not always vote upon a constitutional amendment in the same numbers and with the same interest with which they vote for a particular individual as a candidate for an official carrying a salary.

It is hard to get the voters of the state to attend public meetings at which dry, legal, procedural reforms would be presented for discussion. Yet if they can be aroused and made to realize that their pockets will be profited and their property rights better safeguarded, their litigation expedited, their disputes more effectually and reasonably adjusted, a constitutional reform, even to the extent suggested in the draft Judiciary Article in Part I of this report, can be effected, or in the language of the man in the street, it "can be put across."

In the second place, a legislature is hard to deal with in the matter of procedural reform. The man who has made the profession of law a career and is unwilling to turn aside to the right hand or to the left, rarely runs for the state legislature. There are from time to time great lawyers in local legislatures, and the record of our public life is full of the public service rendered in Congress and in state legislatures by distinguished lawyers. And the legislature of the state of New York has given, by able men, the most careful study and unselfish and untiring labor to this general subject, as evidenced by the enormous record of the work of the Rodenbeck Board, and of Senator Walters' Joint Legislative Committee, and the bar of the state is under a great debt of gratitude to these men. But it must be remembered that these men are *doing this on the side*, and that it is not their chief and main duty or purpose. They have countless other claims upon their time and attention, and it is a marvel that their work is so little open to criticism in view of all these conditions. The four blue volumes which the board published in 1915 do not begin to represent the total labor of this board and of the Joint Legislative Committee that has been dealing with its work.

We are reminded by the nature of the labors of the latter committee of the experience of Theophilus Thistle, the successful thistle-sifter, who in "sifting a sieveful of unsifted thistles, sifted three thousand thistles through the thick of his thumb." The writer of this report was privileged by the Hon. J. Henry Walters, chairman of that legislative committee, to examine the detail of the work which

they had so carefully done. They had taken the more than three thousand thistles of code sections and sifted them, sentence by sentence. Each section was pasted upon a separate manila sheet about two feet square, each sentence in each section was sifted separately and a note made of whether as an adjectival provision it was covered by some general provision of the Short Practice Act, or relegated to the general domain to be covered by rules of court, or, if it was a provision of substantive law, then note was made of the fact that it was preserved and relegated to one of the consolidated laws, *e.g.*, Real Property Law, Domestic Relations Law, Public Officers Law, Judiciary Law, Personal Property Law, etc., or whether it would be repealed. It is obvious that such a task was colossal, and the report of the committee made to the legislature of the state on April 23, 1917, must receive very careful study.

We gather from the report as a whole that the committee does not give unqualified support to the report of the Board of Statutory Consolidation and that it has acquired additional material on the basis of which it, or a similar committee or agency, may be authorized to "prepare and submit a plan of simplification and proposed legislative bills therefor." But we remain unalterably of the opinion that constitutional amendments must accompany such a plan.

We proffer the Judiciary Article in Part One with due acknowledgement to the Group for the Study of Professional Problems and to the original Committee of Seven of this Club, as a starting point, for such a change.

We commend the Short Practice Act of the Committee on the Supreme Court of the New York County Lawyers' Association if boiled down into more generic conciseness, as a starting point for a legislative enactment.[36]

But in regard to the rules of court we believe that there must be a transition period during which, after the unification of the court and the operation of the Short Practice Act the existing rules, so far as not inconsistent with the change, shall continue in operation until the committee appointed by the Board of Organization and Control, including members of the bar, may have formulated appropriate rules.

If the regulation is to be left to the court, the court and not the

[36] See copy thereof, subjoined as Exhibit A.

legislature should create the rules. The experiment by the Supreme Court of the United States on both sides of the practice of the federal courts has been a great success. The work of the American Judicature Society, which is forthcoming, will be a most material aid. The American Bar Association conference of bar associations, convened by it, and the efforts of its Committee on Unification of State Laws, will all contribute to simplify the task of drafting and promulgating rules.

By courtesy of the *Illinois Law Review* and the Northwestern University Press, owners of the copyright, we append, as Exhibit B, a bibliography of this subject in its many aspects prepared by that wheel horse of progress, Roscoe Pound.

We submit the foregoing suggestions for the consideration of the general public as well as of our brethren of the bar, believing that, if public sentiment in favor of such reform and simplification develops, the enlightened opinion of the associations of the bar of the country, of the states and of the counties of the states, will combine to exert such pressure upon the legislatures that they will be willing to propound amended judiciary articles to the electorate and themselves enact such legislation as will carry the reform into operation. The maxims "bis dat qui cito dat," and "If 'twere well 'twere done 'twere well 'twere done quickly," do not necessarily apply. Rather, we would say, "If 'twere well 'twere done, 'twere well 'twere well done."

EXHIBIT A[37]

CIVIL PRACTICE ACT

AN ACT FOR THE SIMPLIFICATION OF THE CIVIL PRACTICE IN THE COURTS OF THE STATE OF NEW YORK

The people of the state of New York, represented in Senate and Assembly, do enact as follows:

1. This act shall be known as the "Civil Practice Act," and except as otherwise expressly provided, shall apply to and govern the civil practice in all of the courts of the state.

2. The courts, within their jurisdiction, shall have all the powers, though not expressly conferred by statute or rules, necessary to the determination or enforcement of the rights of the parties.

3. There shall be but one form of civil "action" under this act in all of the courts subject to this act, which shall be so called,

[37] See Part Two of Report, *supra.*

whether heretofore denominated an action or special proceeding, except that the "writ of habeas corpus" is hereby preserved as a special proceeding.

4. In order to give effect to the provisions of this act and otherwise simplify procedure a convention composed of one justice of the appellate division of the Supreme Court in each department designated by such appellate division and one justice designated by the trial justices of such court in each department and one member of the bar of not less than fifteen years' standing designated by such trial justices, shall, subject to the reserved power of the legislature, have plenary power from time to time to make, alter and amend rules of practice and procedure, not inconsistent with law, binding upon all courts of the state and the judges and justices thereof (except the Court of Appeals, unless otherwise expressly stated, and the court for the trial of impeachments), which shall be called the "Civil Practice Rules." Courts of record may also make such rules as may be necessary to carry into effect the powers and jurisdiction possessed by them, not inconsistent with the foregoing rules.

5. Until the Civil Practice Rules shall be made as herein provided, the rules hereto annexed shall be the rules of the courts governed by this act subject to such changes and additions as the legislature or the courts may make from time to time.

6. The procedure in the courts governed by this act shall be according to the provisions hereof and the Civil Practice Rules to be made from time to time, as herein provided, and in cases where no provision is made by statute or rules, power to make such rules as may be necessary for the conduct of appeals in the Court of Appeals, shall be vested in the judges of the Court of Appeals, and the power to make such rules as may be necessary in the conduct of trials and appeals in the several departments, shall be vested in the appellate division in the several departments.

7. The court, in its discretion and in the interest of substantial justice, may suspend, in whole or in part, the operation of any general rule of practice, but such action may be reviewed by the appellate division upon appeal.

8. At any stage of any action, special proceeding or appeal, a mistake, irregularity or defect may, in the discretion of the court, be corrected or disregarded, providing that a substantial right of any party shall not be thereby affected.

9. No action or proceeding shall fail or be dismissed on the ground that a party therein has mistaken the court, venue, remedy, procedure or because of a misjoinder, non-joinder or defect of parties, if jurisdiction exists to grant the proper remedy; but in such case, upon terms, the matter shall be transferred to the proper court or place of trial, and the pleadings and other proceedings shall be so amended and new pleadings or other proceedings so

issued or taken, that the whole matter in controversy between the parties may be completely and finally determined.

10. Any pleading in any action before or at the trial may, upon suitable terms, for the protection of the opposite party, be amended by the statement therein of new or different cause or causes of action, defense or defenses, counterclaim or counterclaims, or in any other respect.

11. Actions may be consolidated or severed whenever it can be done without prejudice to a substantial right.

12. The courts shall always be open for the transaction of business; a term of court shall continue until a succeeding term is commenced, although the court is not actually in session. A stated term of court is the period designated for the term and during which the court is actually sitting. Trial terms shall be designated as jury terms and court terms. Terms for the hearing of motions shall be known as "motion terms." An order whether issued by a court or a judge thereof shall be the same in form and effect.

13. Any causes of action may be set up in the same complaint and any counterclaim or defenses may be set up in the same answer. The court in its discretion may order one or more issues to be separately tried prior to the trial of any other issues in the case. No action or defense shall fail in whole or in part because a party has an adequate remedy in law therefor, but the court may grant such relief in law or equity with or without a jury as the case may require.

14. Every action shall be prosecuted in the name of the real party in interest, but the executor, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute, may sue in his own name without joining with him the party in whose interest the action is brought.

15. Every action shall be commenced by the service of a summons requiring the appearance of the defendant within ten days thereafter, the mode of service to be prescribed by rules.

16. Where a complete determination of the action cannot be had without the presence of other parties than those named, they shall be brought in; where a person not a party has a title or an interest or a right of any character which the judgment will affect, he may and upon his application must be made a party.

17. The complaint shall concisely state the facts constituting each cause of action. The answer must contain specific admissions or specific denials with respect to the allegations of the complaint or a concise statement of the facts relied upon for a defense. Whenever the answer alleges new matter constituting an affirmative defense or sets up a counterclaim the plaintiff must in like manner make a reply. Any material allegation in the complaint or answer not specifically controverted in the answer or reply shall be deemed admitted.

18. Objections to a pleading in point of law shall be taken either by motion or in the answer or reply.

19. Disposition shall be had by general motion to be made within twenty days after the action is at issue of all matters of procedure and of preliminary and anticipatory relief, including motions for judgment on the pleadings. The mode thereof shall be prescribed by rules. All further relief, other than trial or appeal, shall be granted only in the discretion of the court and upon suitable terms.

20. A party at any place within or without the state before an officer authorized to administer oaths and at any time prior to the trial of an action may examine a party without being bound by the testimony thus elicited provided the examination is had upon reasonable notice to the other parties to the action. The court may in its discretion on good cause shown provide by order that on the examination of a party the material books and records of such party may also be examined.

21. A party, at any place without the state, before an officer authorized to administer oaths, may upon such terms as may be fixed by the court, take the testimony of any person provided all other parties to the action shall have had reasonable notice and shall be afforded an opportunity to cross-examine orally. The court may in its discretion on good cause shown, provide by order that on such examination any material books or records may also be examined. Either party may waive oral examination or cross-examination and submit interrogatories to a witness upon which the examination is to be taken.

22. A party may take the testimony of any witness within the state before an officer authorized to administer oaths at any stage of the action upon reasonable notice to all of the other parties to the action, provided full opportunity be afforded for cross-examination, upon the certificate of the attorney of record that the testimony of the witness is material and necessary, the testimony, however, only to be read in case that, with reasonable diligence, the attendance of the witness at the trial cannot be compelled by subpoena.

23. In case an examination or cross-examination under the three preceding sections is conducted in a vexatious or unreasonable manner, any person or party may apply to the court in which the action is pending for an order prescribing the manner in which such examination shall proceed and the court, upon such application, may impose such costs as a penalty as the court may deem just.

24. In any cause or matter the plaintiff or defendant by leave of the court or a judge may deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: *Provided* that no party shall

deliver more than one set of interrogatories to the same party without an order for that purpose: *Provided also* that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

25. Any party may, without filing any affidavit, apply to the court or a judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the court or judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or make such order, either generally or limited to certain classes of documents, as may, in their or his discretion be thought fit. Provided that discovery shall not be ordered when and so far as the court or judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

26. It shall be lawful for the court or a judge, at any time during the pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter as the court or judge shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just.

27. Every party to a cause or matter shall be entitled, at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his attorney, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the court or judge shall deem sufficient for not complying with such notice: in which case the court or judge may allow the same to be put in evidence on such terms as to costs and otherwise as the court or judge shall think fit.

28. Where inspection of any business books is applied for, the court or a judge may, if they or he shall think fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations, or alterations. *Provided* that notwithstanding that such copy has been supplied, the

court or a judge may order inspection of the book from which the copy was made.

29. The court or a judge may, on the application of any party to a cause or matter at any time and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been in his possession or power; and, if not then in his possession, when he parted with the same, and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the cause or matter, or to some of them.

30. Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the cause or matter may be, unless at the trial or hearing the court or a judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense.

31. Any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter, or issue only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the court or a judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the court or a judge certify that the refusal to admit was reasonable, or unless the court or a judge shall at any time otherwise order or direct. *Provided* that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion or in favor of any person other than the party giving the notice: provided also, that the court or a judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

32. Any party may at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the

determination of any other question between the parties; and the court or a judge may upon such application make such order, or give such judgment, as the court or judge may think just.

33. The court or a judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner.

34. The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary. Any party failing or refusing to comply with such an order shall be liable to attachment, and shall also be liable, if a plaintiff, to have his complaint dismissed, and, if a defendant, to have his answer stricken out and be placed in the same situation as if he had failed to answer.

35. Any testimony taken in an action is admissible in any subsequent trial of the action in case of the death or disability of the witness subsequent to the taking of such testimony or in case that it be shown that the attendance of the witness cannot be compelled by subpoena.

36. A seasonable objection without an exception is sufficient to secure a review of any ruling in any court.

37. A final judgment, dismissing the complaint, either before or after a trial, rendered in an action hereafter commenced, does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment-roll, that it is rendered upon the merits.

38. Issues of fact shall be submitted to the jury in such manner that, so far as practicable, upon a new trial they need not be again submitted to the jury, and to that end the court, in its discretion, may direct the jury to make special findings upon particular questions of fact. In granting a new trial, the court may order that any finding of the jury on any particular question shall be taken as final and conclusive.

39. A judgment may be rendered in favor of any party or parties, and against any party or parties at any stage of an action or appeal if warranted by the pleadings or the admissions of a party or parties; and a judgment may be rendered as to a part of a cause of action and the action proceed as to the remaining issues, as justice may require.

40. An appeal as of right to the appellate division shall lie from an interlocutory or a final judgment also from the order entered upon the general motion. Such appeal shall bring up for review all questions of fact and law. An appeal from any interlocutory

order of the Supreme Court may be allowed by the appellate division.

41. The trial judge is authorized upon a motion for a new trial to direct such a judgment, notwithstanding the verdict, as should have been entered in the action at the time of the trial.

42. A judgment or order shall not be reversed or modified and a new trial shall not be granted on the ground of error in a ruling of the trial court unless it shall appear to the Appellate Court upon the whole case that, but for such error, there might have been a different result upon the trial.

43. Upon appeal, or on application for a new trial, the court in which the appeal or application shall be pending may, in its discretion, take additional evidence by affidavit or deposition, or by reference; *provided* it is done to supply proof of some omitted matter capable of being established by record or other incontrovertible evidence, defective certification, or the proper foundation for evidence which can, in fact, without involving some question for a jury, be shown to be competent.

44. The appeal shall be deemed to remove to the Appellate Court the entire proceedings in the court below, including the stenographer's minutes and all orders, documents and other proceedings had, taken or filed therein, but the rules or the court by order, may provide for the elimination of all unnecessary matter on the settlement of the appeal record.

45. A court or a judge is not authorized to extend the time fixed by law within which to commence an action; or to take an appeal; or to apply to continue an action, where a party thereto has died, or has incurred a disability; or the time fixed by the court within which a supplemental complaint shall be made in order to continue an action; or an action is to abate unless it is continued by the proper parties. A court or a judge may not allow any of those acts to be done after the expiration of the time fixed by law or by the order as the case may be for doing it; except where a party entitled to appeal from a judgment or order or to move to set aside a judgment for error in fact, dies before the expiration of the time within which the appeal may be taken or the motion made, the court may allow the appeal to be taken or the motion to be made by the heir, devisee or personal representative of the decedent at any time within four months after his death.

46. No right, obligation or liability shall fail or be impaired by reason of the passage of this act, or the adoption or passage of any rule, statute, amendment or a statute or repeal thereunder, or the failure to make necessary changes in any statute or rule to conform thereto, or the commission of any clerical error in connection therewith unless it shall clearly appear that a change was intended.

47. This act and the rules adopted thereunder shall not supersede the procedure in any court, regulated by any other statute or

rules adopted thereunder, but such statute and rules shall continue to govern the practice in such court; and when the practice in the Code of Civil Procedure or the General Rules of Practice has been incorporated in any such statute or rules by reference, the provisions shall be deemed in force for the purposes of such reference notwithstanding their repeal by this act; but where the procedure in any court or in any action or proceeding is not otherwise specially regulated it shall be governed by the provisions of this act and the rules adopted in compliance therewith so far as applicable.

48. So far as necessary for the preservation of the rights of the parties the practice in any action or proceeding heretofore commenced shall be conducted in accordance with the practice existing on the day before this act shall take effect. So far as practicable, all subsequent proceedings in such action or special proceeding shall be in conformity with the provisions of this act.

49. The omission to make necessary changes in the language of any statute or rule or any clerical error made in connection with the preparation of the new practice shall not cause any action or proceeding to fail or be impaired, but such statute or rule shall be construed to carry out the true intent and purpose of this act.

50. Statutes and amendments of statutes enacted as a part of the plan for the simplification of the civil practice, shall apply to all the civil courts of the state, and to all actions and civil proceedings other than those regulating the procedure in particular courts, so far as applicable, unless the contrary clearly appears from the context or the subject-matter specially regulated for any court, action or proceeding.

51. A reference in any statute, other than a statute regulating the procedure of any court, to the Code of Civil Procedure or to the General Rules of Practice shall be deemed to be a reference to the appropriate provision enacted or adopted, whether revised or not, as a part of the plan for the simplification of the civil practice, and where the practice in the Code of Civil Procedure or the General Rules of Practice has been incorporated heretofore in any such statute by reference, the reference shall be construed to refer to the new practice on that subject.

52. This act shall not affect the title or tenure to any office or employment or the salary or emoluments thereof, but the same shall continue as heretofore until modified or abolished.

53. A provision of an existing statute enacted as a part of the plan for the simplification of the civil practice shall be construed as having been enacted as of the time when it originally became a law and in case of subsequent amendment as of the date of the enactment of the amendment.

54. This act and all acts passed in connection with or in furtherance hereof shall be deemed and taken to be parts of the plan

for the simplification of the civil practice and shall be liberally construed.

55. Chapter 488 of the laws of 1876 and chapter 178 of the laws of 1880 and all statutes amendatory thereof and supplementary thereto, together constituting the Code of Civil Procedure, are hereby repealed.

56. This act shall take effect on the first day of September, 1918.

EXHIBIT B[38]

A BIBLIOGRAPHY OF PROCEDURAL REFORM, INCLUDING ORGANIZATION OF COURTS[39]

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[38] Reprinted by permission from *Illinois Law Review*, Volume Eleven, Number Seven, Copyright 1917, Northwestern University Press.

[39] This bibliography was prepared in two parts (one dealing with reform of procedure and the other with organization of courts) for the special section of the California Bar Association appointed to investigate and report upon the advisability of having matters of procedure and practice governed by rules of court rather than by legislative enactment. The former part was printed in the report of the section presented to the Association at its meeting in August, 1916, and both parts were printed in the *Recorder* of San Francisco. The two parts have now been merged in a new bibliography and the whole has been brought down to date. The compiler acknowledges his indebtedness to Professor Herbert Harley of Northwestern University for a number of suggestions in connection with this bibliography.

[40] Dean of Harvard University School of Law.

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